DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1025
Title: James R. Clapper, Jr., Director of National Intelligence, et al., Petitioners
v.
Amnesty International USA, et al.
Docketed: February 17, 2012
Linked with 11A555
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (09-4112-cv)
Decision Date: March 21, 2011
Rehearing Denied: September 21, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 9 2011	Application (11A555) to extend the time to file a petition for a writ of certiorari from December 20, 2011 to January 19, 2012, submitted to Justice Ginsburg.
Dec 9 2011	Application (11A555) granted by Justice Ginsburg extending the time to file until January 19, 2012.
Jan 9 2012	Application (11A555) to extend further the time to file a petition for a writ of certiorari from January 19, 2012 to February 18, 2012, submitted to Justice Ginsburg.
Jan 10 2012	Application (11A555) granted by Justice Ginsburg extending the time to file until February 18, 2012.
Feb 17 2012	Petition for a writ of certiorari filed. (Response due March 19, 2012)
Feb 17 2012	Appendix of James R. Clapper, Jr., Director of National Intelligence, et al. filed (Volumes I & II).
Feb 24 2012	Order extending time to file response to petition to and including April 18, 2012.
Mar 19 2012	Brief amici curiae of William Barr, et al. filed.
Apr 18 2012	Brief of respondents Amnesty International USA, et al. in opposition filed.
May 1 2012	DISTRIBUTED for Conference of May 17, 2012.
May 2 2012	Reply of petitioners James R. Clapper, Jr., Director of National Intelligence, et al. filed. (Distributed)
May 21 2012	Petition GRANTED.
May 29 2012	Motion to dispense with printing the joint appendix filed by petitioner James R. Clapper, Jr., Director of National Intelligence, et al.
May 30 2012	The time to file the joint appendix and petitioners' brief on the merits is extended to and including July 26, 2012.
May 30 2012	The time to file respondents' brief on the merits is extended to and including September 17, 2012.

Jun 11 2012	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jul 23 2012	SET FOR ARGUMENT ON Monday, October 29, 2012
Jul 26 2012	Brief of petitioners James R. Clapper, Jr., Director of National Intelligence, et al. filed.
Aug 2 2012	CIRCULATED
Aug 2 2012	Brief amici curiae of John D. Ashcroft, et al. filed. (Distributed)
Aug 8 2012	Record from U.S.C.A. for 2nd Circuit is electronic.
Aug 8 2012	Record from U.S.D.C. for Southern District of New York is electronic.
Aug 13 2012	SET FOR ARGUMENT ON Monday, October 29, 2012
Sep 17 2012	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the respondents
Sep 17 2012	Brief of respondents Amnesty International USA, et al. filed. (Distributed)
Sep 21 2012	Brief amici curiae of Canadian Civil Liberties Association, et al. filed. (Distributed)
Sep 24 2012	Brief amici curiae of Electronic Privacy Information Center (EPIC), et al. filed. (Distributed)
Sep 24 2012	Brief amici curiae of Former Church Committee members and staff filed. (Distributed) Reprinted
Sep 24 2012	Brief amici curiae of Gun Owners Foundation, et al. filed. (Distributed)
Sep 24 2012	Brief amicus curiae of Committee on Civil Rights of the Association of the Bar of the City of New York filed. (Distributed)
Sep 24 2012	Brief amicus curiae of New York State Bar Association filed. (Distributed)
Sep 24 2012	Brief amicus curiae of Constitutional Accountability Center filed. (Distributed)
Sep 24 2012	Brief amici curiae of Center for Constitutional Rights, et al. filed. (Distributed)
Sep 24 2012	Brief amicus curiae of The Reporters Committee for Freedom of the Press filed. (Distributed)
Sep 25 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Oct 17 2012	Reply of petitioners James R. Clapper, Jr., Director of National Intelligence, et al. filed. (Distributed)
Oct 29 2012	Argued. For petitioners: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. For respondents: Jameel Jaffer, New York, N. Y.

PETITION FOR WRIT OF CERTIORARI

No. 11-1025

In the Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT S. LITT
General Counsel

TRICIA S. WELLMAN
Deputy General Counsel

BRADLEY A. BROOKER
Associate General Counsel
Office of the Director of National Intelligence
Washington, DC 20511

PATRICK J. REYNOLDS
Acting General Counsel

ARIANE E. CERLENKO
Deputy General Counsel
National Security Agency
Ft. Meade, MD 20755

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

DOUGLAS N. LETTER
DANIEL J. LENERZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1881a (Supp. II 2008)—referred to here as Section 1881a—allows the Attorney General and Director of National Intelligence to authorize jointly the "targeting of [non-United States] persons reasonably believed to be located outside the United States" to acquire "foreign intelligence information," normally with the Foreign Intelligence Surveillance Court's prior approval of targeting and other procedures. 50 U.S.C. 1881a(a), (b), (g)(2) and (i)(3); cf. 50 U.S.C. 1881a(c)(2). Respondents are United States persons who may not be targeted for surveillance under Section 1881a. Respondents filed this action on the day that Section 1881a was enacted, seeking both a declaration that Section 1881a is unconstitutional and an injunction permanently enjoining any foreign-intelligence surveillance from being conducted under Section 1881a. The question presented is:

Whether respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a-authorized surveillance and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.

PARTIES TO THE PROCEEDING

Petitioners are James R. Clapper, Jr., in his official capacity as Director of National Intelligence; General Keith B. Alexander, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service; and Eric H. Holder, Jr., in his official capacity as Attorney General of the United States.

Respondents are Amnesty International USA; Global Fund for Women; Global Rights; Human Rights Watch; International Criminal Defence Attorneys Association; The Nation Magazine; PEN American Center; Service Employees International Union; Washington Office on Latin America; Daniel N. Arshack; David Nevin; Scott McKay; and Sylvia Royce.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 16
A. The court of appeals erroneously based Article III standing on asserted future injuries that are conjectural and not imminent and on asserted self-inflicted harms 17
B. The court of appeals' holding creates a conflict in the circuits 27
C. Review is warranted to resolve an important and recurring threshold question governing the scope of federal jurisdiction 32
Conclusion 34

TABLE OF AUTHORITIES

Cases:

ACLU v. *NSA*:
438 F. Supp. 2d 754 (E.D. Mich. 2006), rev'd, 493 F.3d 644 (6th Cir. 2007), cert. denied, 552 U.S. 1179 (2008) 29
493 F.3d 644 (6th Cir. 2007), cert. denied, 552 U.S. 1179 (2008) 12, 28, 30
Al-Haramain Islamic Found. v. *Bush*, 507 F.3d 1190 (9th Cir. 2007) 30
Al-Kidd v. *Gonzales*, No. 05-cv-93, 2008 WL 5123009 (D. Idaho 2008) 21
Allen v. *Wright*, 468 U.S. 737 (1984) 33

Cases—Continued: Page

American Constr. Co. v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372 (1893) 33
Bigelow v. *Virginia*, 421 U.S. 809 (1975) 23
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 11, 20
DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) . 17, 18
Davis v. *FCC*, 554 U.S. 724 (2008) 17
Directives, In re, 551 F.3d 1004 (Foreign Int. Surv. Ct. Rev. 2008) 7
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 25
Haig v. *Agee*, 453 U.S. 280 (1981) 22
Halkin v. *Helms*, 690 F.2d 977 (D.C. Cir. 1982) 30
Hein v. *Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007) 33
Laird v. *Tatum*, 408 U.S. 1 (1972) 12, 24
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 14, 17, 18, 22
Meese v. *Keene*, 481 U.S. 465 (1987) 25
National Family Planning & Reprod. Health Ass'n v. *Gonzales*, 468 F.3d 826 (D.C. Cir. 2006) 23
Pennsylvania v. *New Jersey*, 426 U.S. 660 (1976) 23
Raines v. *Byrd*, 521 U.S. 811 (1997) 33
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 18, 33
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 22
Snepp v. *United States*, 444 U.S. 507 (1980) 22
Summers v. *Earth Island Inst.*, 555 U.S. 488 (2009) 15, 17, 19, 20

Cases—Continued: Page

United Presbyterian Church v. *Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) 12, 27, 28
United States v. *Duggan*, 743 F.2d 59 (2d Cir. 1984) 7
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 18
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 15, 19

Constitution, statutes, and regulation:

U.S. Const.:
Art. III ..... *passim*
Amend. I 12, 24
Amend. IV 5, 7
FISA Amendments Act of 2008, Pub. L. No. 110-261, § 101(a)(2), 122 Stat. 2438 4
Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (50 U.S.C. 1801 *et seq.* (2006 & Supp. II 2008)) 2
50 U.S.C. 1801(e) (2006 & Supp. II 2008) 6
50 U.S.C. 1801(f) 2, 3
50 U.S.C. 1801(f)(2) 21
50 U.S.C. 1801(f)(4) 21
50 U.S.C. 1801(h) 3, 6
50 U.S.C. 1801(i) 3
50 U.S.C. 1801(k) 6
50 U.S.C. 1805 (2006 & Supp. II 2008) 3
50 U.S.C. 1805(a) (Supp. II 2008) 21
50 U.S.C. 1805(a)(2) (Supp. II 2008) 3
50 U.S.C. 1805(a)(3) (Supp. II 2008) 3

Statutes and regulation—Continued: Page

50 U.S.C. 1805(c)(2)(A) 3
50 U.S.C. 1806(c) 6
50 U.S.C. 1806(e) 6
50 U.S.C. 1806(f) 6
50 U.S.C. 1809(a)(1) (Supp. II 2008) 3
50 U.S.C. 1881(a) (Supp. II 2008) 6
50 U.S.C. 1881a (Supp. II 2008) ..... *passim*
50 U.S.C. 1881a(a) (Supp. II 2008) 5
50 U.S.C. 1881a(b) (Supp. II 2008) 6
50 U.S.C. 1881a(b)(1) (Supp. II 2008) 5, 20
50 U.S.C. 1881a(b)(2) (Supp. II 2008) 5, 20
50 U.S.C. 1881a(b)(3) (Supp. II 2008) 5, 20
50 U.S.C. 1881a(b)(5) (Supp. II 2008) 5
50 U.S.C. 1881a(c)(1) (Supp. II 2008) 5
50 U.S.C. 1881a(c)(2) (Supp. II 2008) 5
50 U.S.C. 1881a(d) (Supp. II 2008) 5
50 U.S.C. 1881a(e) (Supp. II 2008) 5
50 U.S.C. 1881a(g)(2)(A)(i) (Supp. II 2008) 6
50 U.S.C. 1881a(g)(2)(A)(ii) (Supp. II 2008) 6
50 U.S.C. 1881a(g)(2)(A)(vi) (Supp. II 2008) 6
50 U.S.C. 1881a(g)(2)(A)(vii) (Supp. II 2008) 6
50 U.S.C. 1881a(h)(4) (Supp. II 2008) 7
50 U.S.C. 1881a(h)(6) (Supp. II 2008) 7
50 U.S.C. 1881a(i)(1) (Supp. II 2008) 6
50 U.S.C. 1881a(i)(2) (Supp. II 2008) 5, 6
50 U.S.C. 1881a(i)(3) (Supp. II 2008) 5
50 U.S.C. 1881a(i)(3)(A) (Supp. II 2008) 6

Statutes and regulation—Continued: Page

50 U.S.C. 1881b (Supp. II 2008) 5
50 U.S.C. 1881c (Supp. II 2008) 5
50 U.S.C. 1881e(a) (Supp. II 2008) 6
Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2510 *et seq.* 3
50 U.S.C. 403-5a(a) 4
Exec. Order No. 12,333, 3 C.F.R. 200 (1981 Comp.), reprinted as amended in 50 U.S.C. 401 note (Supp. II 2008) 4, 27
§ 1.3(b)(4) 4
§ 1.7(a)(1) 4
§ 1.7(a)(5) 4
§ 1.7(c)(1) 4
§ 2.2 4

Miscellaneous:

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 33
S. Rep. No. 701, 95th Cong., 2d Sess. (1978) 27

In the Supreme Court of the United States

No. 11-1025

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Director of National Intelligence and the other petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is reported at 638 F.3d 118. The order of the court of appeals denying rehearing en banc (Pet. App. 114a-115a), and opinions regarding the denial of rehearing (Pet. App. 116a-196a), are not yet reported in the *Federal Reporter* but are available at 2011 WL 4381737. The opinion of the district court (Pet. App. 62a-113a) is reported at 646 F. Supp. 2d 633.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2011. A petition for rehearing was denied on September 21, 2011 (Pet. App. 114a-115a). On December 9, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including January 19, 2012. On January 10, 2012, Justice Ginsburg further extended the time to February 18, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (50 U.S.C. 1801 *et seq.* (2006 & Supp. II 2008)), are set out in the appendix to the petition (Pet. App. 415a-468a).[1]

STATEMENT

1. Congress enacted FISA in 1978 to regulate, *inter alia*, the government's use of certain types of communications surveillance for foreign-intelligence purposes. In doing so, Congress limited the definition of the "electronic surveillance" governed by FISA to four discrete types of domestic intelligence activities. See 50 U.S.C. 1801(f). Specifically, Congress defined "electronic surveillance" in FISA to mean (1) the acquisition of the contents of a wire or radio communication obtained by "intentionally targeting" a "particular, known United States person who is in the United States"; (2) the acquisition of the contents of a wire communication to or from

---

[1] All citations to FISA in this brief are to the 2006 edition of the United States Code as supplemented, where relevant, by the Code's 2008 Supplement.

a "person in the United States" when the "acquisition occurs in the United States"; (3) the intentional acquisition of the contents of certain radio communications when "the sender and all intended recipients are located within the United States"; and (4) the installation or use of a surveillance device "in the United States" in certain circumstances. *Ibid.*; cf. 50 U.S.C. 1801(i) (defining "United States person").

Before the United States may conduct such "electronic surveillance" to obtain foreign-intelligence information, FISA generally requires the government to obtain an order from a judge on the Foreign Intelligence Surveillance Court (FISC). 50 U.S.C. 1805, 1809(a)(1). To obtain such an order, the government must establish, *inter alia*, probable cause to believe that the "target of the electronic surveillance" is a foreign power or an agent thereof and that "each of the facilities or places" at which the surveillance is directed (inside or outside the United States) is being used, or is about to be used, by a foreign power or its agent. 50 U.S.C. 1805(a)(2). The government must also establish that the "minimization procedures" that it would employ are reasonably designed to minimize the acquisition and retention, and prohibit the dissemination, of nonpublic information concerning "United States persons," consistent with the government's need to obtain, produce, and disseminate foreign-intelligence information. 50 U.S.C. 1801(h), 1805(a)(3) and (c)(2)(A).[2]

---

[2] Congress has separately authorized other types of domestic surveillance activities. For example, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, regulates the interception of wire, oral, or electronic communications for law-enforcement purposes.

Because of FISA's definition of "electronic surveillance," FISA as originally enacted did not apply to the vast majority of surveillance that the government conducted outside the United States, even if that surveillance might specifically target United States citizens abroad or incidentally acquire (while targeting third parties abroad) communications to or from citizens in the United States. Instead, Executive Order No. 12,333, as amended, addresses the government's "human and technical collection techniques * * * undertaken abroad." Exec. Order No. 12,333, § 2.2, 3 C.F.R. 200 (1981 Comp.), reprinted as amended in 50 U.S.C. 401 note (Supp. II 2008). That Executive Order governs the Intelligence Community, *inter alia*, in collecting "foreign intelligence and counterintelligence" abroad, collecting "signals intelligence information and data" abroad, and utilizing intelligence relationships with "intelligence or security services of foreign governments" that independently collect intelligence information. *Id.* §§ 1.3(b)(4), 1.7(a)(1), (5) and (c)(1).[3]

2. This case involves a constitutional challenge to Section 702 of FISA, 50 U.S.C. 1881a, which was enacted in 2008 as part of the FISA Amendments Act of 2008 (FAA), Pub. L. No. 110-261, § 101(a)(2), 122 Stat. 2438. That provision—referred to here as Section 1881a—establishes new, supplemental procedures for authorizing certain types of surveillance targeting non-United

---

[3] Congress has separately authorized certain intelligence activities abroad for purposes other than for obtaining foreign intelligence. The intelligence community has statutory authority to "collect information outside the United States about individuals who are not United States persons" for "purposes of a law enforcement investigation," when requested by a United States law-enforcement agency. 50 U.S.C. 403-5a(a).

States persons located outside the United States when the acquisition involves obtaining foreign-intelligence information from or with the assistance of an electronic communication service provider.[4]

Section 1881a permits the Attorney General and Director of National Intelligence jointly to authorize the "targeting of persons reasonably believed to be located outside the United States" to acquire "foreign intelligence information." 50 U.S.C. 1881a(a). Section 1881a specifies that the authorized acquisition may not intentionally "target a United States person"—whether that person is known to be in the United States or is reasonably believed to be outside the United States, 50 U.S.C. 1881a(b)(1) and (3)—and may not target a person outside the United States "if the purpose * * * is to target a particular, known person reasonably believed to be in the United States," 50 U.S.C. 1881a(b)(2). Section 1881a further requires that the acquisition be "conducted in a manner consistent with the [F]ourth [A]mendment." 50 U.S.C. 1881a(b)(5).

Except in certain "exigent circumstances," 50 U.S.C. 1881a(c)(2), Section 1881a requires the government to obtain the FISC's approval of (1) a government certification regarding the proposed surveillance and (2) the targeting and minimization procedures to be used in the acquisition. 50 U.S.C. 1881a(a), (c)(1), and (i)(2) and (3); see 50 U.S.C. 1881a(d) and (e). The certification must be by the Attorney General and Director of National Intelligence and must attest that, *inter alia*, (1) the acquisition does not violate the Fourth Amendment and com-

---

[4] The FAA enacted other amendments to FISA, including new provisions that now govern the targeting of United States persons abroad to collect foreign-intelligence information in certain contexts. See 50 U.S.C. 1881b, 1881c. Those provisions are not at issue in this case.

plies with the aforementioned limitations prohibiting the targeting of United States persons; (2) the acquisition involves obtaining "foreign intelligence information from or with the assistance of an electronic communication service provider"; (3) the targeting procedures in place are reasonably designed to ensure that any acquisition targets only persons reasonably believed to be outside the United States; and (4) the minimization procedures appropriately restrict the acquisition, retention, and dissemination of nonpublic information about United States persons. 50 U.S.C. 1881a(g)(2)(A)(i), (ii), (vi) and (vii); see 50 U.S.C. 1801(h), 1881a(b); cf. 50 U.S.C. 1801(e), 1881(a) (defining "foreign intelligence information").

The FISC must review the certification, targeting and minimization procedures, and any amendments thereto. 50 U.S.C. 1881a(i)(1) and (2). If the FISC determines that the certification contains all the required elements and that the procedures are "consistent with" the Act and "the [F]ourth [A]mendment," the FISC will issue an order approving the certification and the use of the targeting and minimization procedures for the acquisition. 50 U.S.C. 1881a(i)(3)(A).

If the government intends to use or disclose any information obtained or derived from its acquisition of a person's communications under Section 1881a in judicial or administrative proceedings against that person, it must provide advance notice of its intent to the tribunal and the person, even if the person was not targeted for surveillance under Section 1881a. 50 U.S.C. 1881e(a); see 50 U.S.C. 1801(k), 1806(c). That person may then challenge the use of that information in district court by challenging the legality of the Section 1881a acquisition. 50 U.S.C. 1806(e) and (f), 1881e(a). Separately, any

electronic service provider the government directs to assist in Section 1881a surveillance may challenge the lawfulness of that directive in the FISC. 50 U.S.C. 1881a(h)(4) and (6); cf. Pet. App. 144a-145a.[5]

3. On the day Section 1881a was enacted (July 10, 2008), respondents—four individual attorneys and nine organizations in the United States—filed this action challenging Section 1881a's constitutionality. Pet. App. 197a, 200a-203a, 240a-241a. Respondents seek a declaration that Section 1881a is unconstitutional and an injunction permanently enjoining the government from "conducting surveillance pursuant to the authority granted by section [1881a]." *Id.* at 241a.

At summary judgment, three attorney respondents and three organizational respondents submitted evidence supporting their assertion of Article III standing.[6] Respondents do not claim that they will, or ever could be, targeted for surveillance under Section 1881a. They instead assert that they "reasonably believe" that their communications will be incidentally acquired under Section 1881a, because they communicate with people abroad whom they believe the "U.S. government is likely

---

[5] Cf. also, *e.g.*, *In re Directives*, 551 F.3d 1004 (FISC Rev. 2008) (addressing Fourth Amendment challenge brought by electronic service provider under a predecessor provision in the Protect America Act); *United States* v. *Duggan*, 743 F.2d 59 (2d Cir. 1984) (addressing constitutional challenge to FISA by individual against whom evidence collected under FISA was introduced).

[6] See Pet. App. 349a-353a (Sylvia Royce), 368a-375a (Scott McKay and David Nevin); *id.* at 334a-339a, 363a-367a (Naomi Klein and Christopher Hedges declarations for Nation Magazine), 340a-347a (Joanne Marnier declaration for Human Rights Watch), 354a-362a (John Walsh declaration for Washington Office on Latin America). The seven other respondents submitted no evidence to support their standing. Gov't C.A. Br. 19 n.7.

to target" for surveillance under Section 1881a. Pet. App. 214a; see *id.* at 337a, 343a-344a, 350a-352a, 356a-357a, 366a, 370a-371a. Respondents state that their work requires them to engage in sensitive telephone and email communications with non-United States persons located outside the United States who, respondents contend, are alleged to be associated with terrorists or terrorist organizations; are foreign government officials; are political activists opposing governments supported by the United States; or are located in geographic areas that are a special focus of the government's counterterrorism or diplomatic efforts. *Ibid.* Respondents believe that some of the information they exchange with those individuals involves "foreign intelligence information" as defined by FISA. *Id.* at 215a. Based on their fear that their communications may be incidentally intercepted by Section 1881a surveillance targeting others, respondents assert that they "will have to take burdensome and costly measures to minimize the chance" of such an interception by, for instance, "travel[ing] long distances to collect information that could otherwise have been gathered by telephone or email." *Ibid.*; see *id.* at 338a, 345a, 352a, 367a, 372a-373a.

4. The district court dismissed respondents' claims at summary judgment for want of Article III standing. Pet. App. 62a-113a.

The district court first determined that respondents' "abstract fear that their communications will be monitored under the FAA" in the future (Pet. App. 84a-85a) does not constitute an Article III injury-in-fact. *Id.* at 82a-100a. The court explained that courts of appeals had previously rejected similar standing claims based on plaintiffs' "fear of surveillance," and that respondents' "alleged injury * * * [was] even more speculative"

than those previously held insufficient. *Id.* at 86a-87a, 100a. Section 1881a, the court explained, "does not authorize the surveillance of [respondents'] communications" because Section 1881a-authorized surveillance cannot "target [respondents]." *Id.* at 85a. The court further observed that respondents "make no claim that their communications have yet been monitored" and "make no allegation or showing that the surveillance of their communications has been authorized or that the Government has sought approval for such surveillance." *Id.* at 63a. Whether the government would ultimately seek a Section 1881a "order * * * that affects [respondents'] rights" and "whether such [a request] would be granted by the FISC," the court concluded, was "completely speculative." *Id.* at 85a; see *id.* at 96a-97a.

The district court likewise held that respondents could not establish Article III standing based on the cost of measures they purportedly take to protect the confidentiality of their communications. Pet. App. 100a-112a. The court explained that this second, cost-based theory was not a "truly independent" one, because "the costs incurred by [respondents] flow directly from [their] fear of surveillance." *Id.* at 101a. Respondents, the court held, "cannot manufacture a sufficient basis for standing from an insufficient one" by electing to expend their own funds or alter their actions. *Ibid.*

5. A panel of the court of appeals reversed. Pet. App. 1a-61a. The court held that respondents established Article III standing based on (1) their fear that the government would cause them a "future injury" by intercepting their communications under Section 1881a, and (2) their claim that their own "expenditure of funds" is a "present injury" caused by Section 1881a, *id.* at 25a-27a. See *id.* at 25a-50a.

a. Taking the second theory first, the court of appeals concluded that respondents' "expenditure of funds" qualified as "the most mundane [type] of injuries in fact." Pet App. 26a. In the court's view, those injuries were "caused by the challenged statute" because "it was not unreasonable for [respondents] to incur costs out of fear that the government will intercept their communications under [Section 1881a]." *Id.* at 27a. The court stated that a "plaintiff's self-inflicted injury" will not be fairly traceable to a statute if it results from an "unreasonable decision" by the plaintiff, but that, in this case, respondents' injuries were caused by Section 1881a because their "fear of the FAA" was not "fanciful, paranoid, or otherwise unreasonable" and because, in the court's view, the "possibility of interception is [not] remote or fanciful." *Id.* at 27a-28a; see *id.* at 31a-36a. The court recognized that Section 1881a does not authorize surveillance "target[ing] [respondents] themselves," but it concluded that that fact did not alter its analysis (*id.* at 41a), because it determined that a plaintiff can establish Article III "standing to challenge a statute that does not regulate him if he can show that the statute reasonably caused him to alter or cease certain conduct," *id.* at 46a. See *id.* at 41a-46a.

In this case, the court found it "significant that the injury that [respondents] fear results from conduct that is authorized by statute." Pet. App. 36a. "[T]he fact that the government has authorized the potentially harmful conduct" by enacting Section 1881a, the court reasoned, "means that [respondents] can reasonably assume that government officials will actually engage in that conduct by carrying out the authorized surveillance." *Id.* at 36a-37a. Although the court identified no evidence of the government's actual surveillance activi-

ties under Section 1881a (or other legal authority), the court deemed it "extremely likely" that the government would "undertake broad-based surveillance" under the authority of Section 1881a and concluded that respondents had "good reason to believe that their communications" would be intercepted because the government did not dispute respondents' assertion that respondents believed that they communicate with "likely targets of FAA surveillance." *Id.* at 37a. The court rested its conclusion on what it labeled a "reasonable interpretation of [Section 1881a] and a realistic understanding of the world," explaining that it was "reasonable to expect that the government will seek surveillance authorization under [Section 1881a]" and that it was "fanciful to suggest" that the government would "more than rarely fail" to convince the FISC to issue an order authorizing such surveillance. *Id.* at 38a-40a. Given that possibility of future surveillance, the court found it "reasonable for [respondents] to take measures to avoid being overheard." *Id.* at 47a-49a.

b. The court of appeals likewise held that respondents could establish Article III standing under their "future-injury theory." Pet. App. 29a. The court stated that "probabilistic [future] injuries constitute injuries in fact only when they reach a certain threshold of likelihood." *Id.* at 26a (citing *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 107 n.8 (1983)). The court then concluded that the prospect that the government would intercept respondents' communications using FISC-approved surveillance targeting others under Section 1881a was "sufficiently likely to confer standing" because, in its view, the test for "basing standing on the risk of future harm" simply requires "an objectively reasonable likelihood" of such harm. *Id.* at 29a. For the reasons discussed above,

the court concluded that "[Section 1881a] creates an objectively reasonable likelihood that [respondents'] communications are being or will be monitored under the FAA." *Ibid.*

c. The court of appeals found this Court's standing analysis in *Laird* v. *Tatum*, 408 U.S. 1 (1972), to be inapplicable. Pet. App. 50a-60a. Although it noted that *Laird* held that plaintiffs had failed to establish Article III standing to "challenge[] a surveillance program" based on their claim that the program's "chilling effect" caused them to cease First Amendment activities, the court of appeals concluded that respondents had established "specific and concrete injuries" different than those in *Laird*. *Id.* at 50a-54a. The court acknowledged that the D.C. Circuit has read *Laird* as requiring that a plaintiff prove "some concrete harm (past or immediately threatened) *apart from* the 'chill' itself," *id.* at 56a & n.31 (quoting *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375, 1378 (1984) (Scalia, J.)), and that the Sixth Circuit's decision in *ACLU* v. *NSA*, 493 F.3d 644 (2007), cert. denied, 552 U.S. 1179 (2008), was in accord. Pet. App. 56a & n.31, 59a. But the court of appeals opined that the "interpretations of *Laird*" adopted by those circuits—both of which read "*Laird* essentially the same way [as] the government"—was not "persuasive," was not "bind[ing]" in the Second Circuit, and arose in contexts that the court found "factually distinguishable." *Id.* at 58a-59a & n.32.

d. Finally, the court of appeals held that respondents satisfied the redressability prong of standing. Pet. App. 41a n.24. It reasoned that judicial relief would likely redress respondents' claimed injury, because "[respondents'] injuries stem from their reasonable fear of being monitored by FAA-authorized government surveil-

lance," and the requested injunction would "prohibit[] the government from conducting surveillance under the FAA." *Ibid.*

6. The court of appeals denied the government's petition for en banc rehearing by an equally divided, six-to-six vote. Pet. App. 114a-115a. Judge Lynch, who authored the panel opinion, authored an opinion concurring in the denial of rehearing, which no other judge joined. *Id.* at 116a-133a. Four other judges authored dissenting opinions. *Id.* at 133a-175a (Raggi, J.), 175a-189a (Livingston, J.), 189a-196a (Jacobs, C.J.), 196a (Hall, J.).

a. Judge Raggi, who authored the principal dissent on behalf of five judges, concluded that the panel's "novel, relaxed standing standard" was "unprecedented," was "wholly at odds with Supreme Court precedent," and "create[d] a split" with the other circuits that have addressed "standing to challenge foreign intelligence surveillance programs." Pet. App. 133a, 135a. She explained that the panel erred in ruling that respondents' "professed *fear* of interception under the statute" and their related choice to "incur[] costs to conduct conversations in person" were "sufficient to support standing because the fear is not 'irrational,'" *id.* at 133a, and that the panel's decision was inconsistent with settled standing precedent. *Id.* at 136a.

Judge Raggi found that a central flaw in the panel's analysis was its improper "reasoning that, in lieu of injury inflicted by the government through actual or imminent FAA interception, [respondents] can establish standing through self-inflicted injury, specifically, costs incurred to meet with foreign contacts rather than risk feared FAA interception." Pet. App. 147a. That error, she explained, enabled the panel to determine that "the

likelihood of interception becomes relevant only to causation, *i.e.* were the incurred costs 'fairly traceable' to the FAA?" *Id.* at 147a-148a. Under that rationale, Judge Raggi observed, "for the price of a plane ticket, [respondents] can transform their standing burden from one requiring a showing of actual or imminent FAA interception to one requiring a showing that their subjective fear of such interception is not 'fanciful,' 'irrational,' or 'clearly unreasonable.'" *Id.* at 148a.

Judge Raggi opined that the panel's holding conflicts with this Court's precedents, which require plaintiffs who base Article III standing on a "future" injury to show that that injury is "imminent," *i.e.*, "*certainly* impending." Pet. App. 146a-147a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)). She also explained that respondents' "subjective fear of FAA interception" is "plainly insufficient" to show a cognizable injury, and that respondents' related theory that they incurred costs to minimize the possibility of interception similarly reflected a type of "subjective chilling" insufficient under this Court's jurisprudence. *Id.* at 147a, 149a-151a.

Judge Raggi pointed out that other courts of appeals had "confronted challenges to other programs authorizing, but not directing, intelligence surveillance" and that those courts had "uniformly found that plaintiffs lacked standing precisely because they could not demonstrate actual or imminent interception." Pet. App. 162a. The panel's contrary reasoning, she concluded, created a "circuit split." *Id.* at 163a-164a. See *id.* at 161a-164a (discussing, *inter alia*, the D.C. and Sixth Circuits' decisions in *United Presbyterian Church* and *ACLU* v. *NSA*).

Finally, Judge Raggi concluded that respondents failed to demonstrate that their claimed injuries were redressable. Pet. App. 168a-173a. She noted that an order "enjoining the FAA [would] merely eliminate one of several means for" monitoring the contacts who respondents believe "are 'likely' to be targeted for FAA surveillance." *Id.* at 169a. Even without the FAA, the United States could monitor such persons abroad with, for instance, "NSA surveillance programs" not covered by FISA or surveillance under traditional FISA orders. *Id.* at 172; see *id.* at 171a n.22. Judge Raggi also recognized the "real possibility" that "other countries" would target the same persons abroad given respondents' description of their contacts. *Id.* at 172a. Judge Raggi accordingly determined that respondents failed to show that their "self-inflicted" injury likely would be redressed by enjoining only that subset of surveillance activities conducted under Section 1881a. *Id.* at 169a, 173a.

b. Judge Livingston's dissenting opinion for five judges (Pet. App. 175a-189a) described the panel's decision as a "truly unprecedented" and "startling" "transformation" of standing law involving "probabilistic harm," *id.* at 175a, 178a-179a. She noted that this Court has "said many times before" that allegations of "possible future injury do not satisfy the requirements of Art[icle] III," *id.* at 175a (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)) (brackets in original), and recently held that a "*statistical probability* of future harm" is insufficient, *id.* at 176a (discussing *Summers* v. *Earth Island Inst.*, 555 U.S. 488 (2009)). She reasoned that the panel erred in failing to demand that respondents show an "actual or imminently threatened" injury, *ibid.*, and explained that the panel's contrary analysis

mistakenly relied on decisions addressing materially different contexts, *id.* at 180a-187a. The panel's mistaken view that "an 'objectively reasonable' threat of future surveillance [is] sufficient for Article III standing," Judge Livingston ultimately concluded, was a "truly dramatic and unjustified expansion" of standing law that was "contrary to the approaches taken in surveillance cases by our sister circuits" and "not in keeping with the limited role of the judiciary in our constitutional structure." *Id.* at 188a-189a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that respondents—who cannot be targeted by surveillance conducted under Section 1881a and who have not established that they have been or ever will be incidentally subjected to any Section 1881a-authorized surveillance targeting third parties abroad—possess Article III standing to challenge Section 1881a's constitutionality. The court based that holding on its view that respondents showed (1) a sufficiently threatened "future injury" with an "objectively reasonable likelihood" of being incidentally exposed to such surveillance targeting others, and (2) a "present injury" by electing to incur costs in an effort to minimize the possibility of the surveillance they fear. That unprecedented decision is inconsistent with this Court's decisions, which (1) require proof of a non-conjectural and "imminent"—*i.e.*, "certainly impending"—injury in fact where the prospect of future injury is asserted, and (2) reject as insufficient a self-imposed injury stemming from the asserted chilling effect of a plaintiff's fears concerning a defendant's future actions. The panel's decision also conflicts with the decisions of other courts of appeals in analogous surveillance contexts, and it re-

quires that the constitutionality of an Act of Congress authorizing important foreign-intelligence-gathering activity directed abroad at third parties be litigated in the abstract without an appropriate factual context. In view of those considerations, and the vitally important national-security context in which the issue arises, this Court's review is warranted.

A. The Court Of Appeals Erroneously Based Article III Standing On Asserted Future Injuries That Are Conjectural And Not Imminent And On Asserted Self-Inflicted Harms

To establish Article III standing, a plaintiff must establish (1) that he has "suffered an injury in fact * * * which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a sufficient "causal connection between the injury and the conduct complained of"; and (3) a "likel[ihood]" that "the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks and citations omitted). The plaintiff must "demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) (citation omitted). And to seek injunctive relief, the plaintiff must establish a present injury or an "actual and imminent"—not "conjectural"—threat of future injury. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009). That imminent injury must be present "at the commencement of the litigation," *Davis* v. *FCC*, 554 U.S. 724, 732 (2008) (citation omitted), which in this case was the date Section 1881a was enacted.

The court of appeals departed from these principles in basing Article III jurisdiction on (1) a purported "fu-

ture injury"—the incidental interception of respondents' communications under Section 1881a—that is conjectural and not imminent; (2) respondents' self-inflicted "present injury" resulting from their own fear of such surveillance; and (3) speculation that an injunction targeting only Section 1881a-authorized surveillance (and not any other) would redress the asserted injury.

1. The "purpose" of the requirement that the plaintiff establish that he will sustain an "imminen[t]" and non-conjectural "future injury" is "to ensure that the alleged injury is not too speculative for Article III purposes" by requiring proof that "the injury is '*certainly* impending.'" *Defenders of Wildlife*, 504 U.S. at 565 n.2. (citation omitted) Proof of an imminent and concrete injury is also necessary to provide "the essential dimension of [factual] specificity" to a case, *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974), and assure that legal questions "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). An injury cannot be "imminent" if it is based on "speculati[on] that [government] officials will" take harmful actions, because such conjecture gives "no assurance that the asserted injury is * * * 'certainly impending.'" *DaimlerChrysler Corp.*, 547 U.S. at 344-345.

The court of appeals made no attempt to determine whether respondents established an "imminent" future injury from a Section 1881a-authorized acquisition of their communications, let alone conclude that such an acquisition was "certainly impending" on the day Section 1881a became law. It instead held that respondents

could prove standing by showing that "[Section 1881a] creates an *objectively reasonable likelihood* that [their] communications are being or will be monitored under the FAA." Pet. App. 29a (emphasis added). That novel standard of "likelihood" of injury at some future point disregards this Court's repeated admonition that a "threatened injury *must be 'certainly impending'* to constitute injury in fact." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added; citation omitted). The Court has "said many times" that such "[a]llegations of possible future injury do not satisfy the requirements of Art. III." *Ibid.*

The Court in *Summers*, for instance, required proof of an "imminent future injury" by plaintiffs seeking an injunction to halt the Forest Service's use of regulations authorizing it to take certain land-management actions without public notice or an opportunity for comment or appeal. 555 U.S. at 492-495. The plaintiffs (like respondents here) attempted to challenge the regulations as an unlawful grant of authority, but *Summers* held that they failed to establish their standing because they could not identify an actual "application of the [challenged] regulations that threatens imminent and concrete harm." *Id.* at 494-495. The Court reasoned that it would "fly in the face of Article III's injury-in-fact requirement" to permit such an untethered challenge to a "regulation in the abstract." *Id.* at 494. The Court also concluded that the requisite injury in fact could not be established by a "statistical probability" of a future injury, *id.* at 497-499, and determined that a "*realistic* threat" of future harm does not satisfy "the requirement of 'imminent' harm," *id.* at 499-500. The court of appeals here did precisely what *Summers* forbids: It allowed respondents to challenge Section 1881a's constitutionality "in the abstract,"

in the absence of any showing of an "imminent" and "concrete application" (*id.* at 494), because it found an "objectively reasonable likelihood" that the government would sometime in the future acquire respondents' communications using authority conferred by Section 1881a. Pet. App. 29a.

The court of appeals concluded that *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), supported its contrary position because, in the court's view, *Lyons* "articulated the principle that a plaintiff may obtain standing by showing a sufficient likelihood of future injury." Pet. App. 33a; see *id.* at 31a-33a. But as *Summers* explained, *Lyons* is an "opinion that did *not* find standing, so the seeming expansiveness of the test made not a bit of difference"; it does not support a standing test satisfied by a "*realistic* threat" of injury instead of proof of an actual, imminent future harm. 555 U.S. at 499-500 (discussing the dissenting view that *Lyons* suggested that standing might be shown with a "*realistic likelihood*" that proven, past conduct would recur in the "reasonably near future," *id.* at 505 (Breyer, J., dissenting) (citation omitted)). As the dissenting judges explained below, respondents have proffered nothing to prove any imminent future injury. Pet. App. 146a-148a, 175a-176a, 181a-188a.

The panel's decision simply cannot be reconciled with established standing jurisprudence. Section 1881a does not authorize surveillance targeting respondents or any other United States person, 50 U.S.C. 1881a(b)(1)-(3), and respondents have presented no evidence that their international communications have ever been incidentally acquired by the government in its surveillance of non-United States persons abroad. Respondents have instead sought to show that they "believe" that the

United States will "likely" acquire their communications with persons abroad because respondents conclude that those third parties may be targeted by the United States. *E.g.*, Pet. App. 343a-344a, 350a, 356a-357a, 366a. That showing fails for multiple reasons.

First, respondents' own "belief" reflects bare conjecture that the government will choose to expend its limited resources to target respondents' foreign contacts. Second, even if the government were to want to obtain the communications of such persons, respondents have proffered nothing to show that the government would imminently acquire respondents' communications using surveillance *authorized by Section 1881a*. As Judge Raggi correctly recognized, there are "several means" for the intelligence community to collect information about persons outside the United States other than Section 1881a-authorized surveillance. Pet. App. 169a, 172a; cf. pp. 3-4, *supra*.[7] Even if the government were to seek FISC approval of surveillance activity, respondents have provided no basis for concluding that the FISC would approve the request under Section 1881a. Pet. App. 165a-167a (Raggi, J., dissenting).

---

[7] Respondent Scott McKay, for instance, believes that his international communications with Sami Omar Al-Hussayen will be acquired under Section 1881a because the government previously intercepted Al-Hussayen's communications. Pet. App. 370a-371a. But the government lawfully acquired Al-Hussayen's communications using FISA authority that existed long before Section 1881a. See *Al-Kidd* v. *Gonzales*, No. 05-cv-93, 2008 WL 5123009, at *5-*6 (D. Idaho 2008) (finding that surveillance lawful). Respondents provide no reason to conclude that any ongoing surveillance targeting Al-Hussayen (if it were to occur) would not continue to operate under that authority. Cf. 50 U.S.C. 1801(f)(2) and (4), 1805(a) (authorizing targeting of agents of foreign powers with surveillance directed at facilities used by the target if the acquisition occurs or a surveillance device is used in the United States).

Notwithstanding the absence of evidence about the United States' actual conduct of foreign-intelligence activities, the court of appeals relied on what the court itself regarded as a "realistic understanding of the world" to assess the likely nature and scope of future foreign-intelligence acquisitions under Section 1881a. Pet. App. 38a. Given the "secrecy of our Government's foreign intelligence operations"—a secrecy "'essential to the effective operation of our foreign intelligence service,'" *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (quoting *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980))—the court of appeals could not reliably determine without evidence what is "realistic" in this context. Such "unadorned speculation [does] not suffice to invoke the federal judicial power." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).[8]

2. The court of appeals' "present injury" theory of standing is equally troubling. The court held that respondents' own "expenditure of funds" qualified as an injury in fact "caused by the challenged statute" because "it was not unreasonable for [respondents] to incur costs out of fear that the government will intercept their communications under [Section 1881a]." Pet. App. 26a-27a. The court stated that such a "self-inflicted injury" resulting from respondents' "fear of the FAA" establishes Article III standing because their fear was not "fanciful, paranoid, or otherwise unreasonable." *Id.* at 27a-28a. That expansive and novel holding is wrong.

---

[8] Seven respondents failed to present *any* proof of standing at summary judgment. See p. 7 & n.6, *supra*. The court of appeals clearly erred in reversing the district court's holding that those respondents failed to establish standing. Cf. *Defenders of Wildlife*, 504 U.S. at 561 (plaintiffs must proffer evidence of their standing to survive summary judgment).

No litigant "can be heard to complain about damage inflicted by its own hand." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). Respondents here have simply elected to expend their funds because they have decided to try to limit the possibility that their international communications might be incidentally acquired by government surveillance targeting others. As the D.C. Circuit has "consistently held," such "self-inflicted harm doesn't satisfy the basic requirements for standing": It "does not amount to an 'injury' cognizable under Article III" and, even if it did, "it would not be fairly traceable to the defendant's challenged conduct." *National Family Planning & Reprod. Health Ass'n* v. *Gonzales*, 468 F.3d 826, 831 (2006). Respondents are fully capable of avoiding their own expenditure of money without an injunction.

There is no basis for treating plaintiffs who decide to inflict harms upon themselves any differently than similarly situated plaintiffs who do not. Both will have (or lack) Article III standing based on the presence (or absence) of an imminent injury from the defendant's challenged conduct. Any contrary rule, as Judge Raggi explained, would incorrectly permit litigants to manufacture Article III standing "for the price of a plane ticket." Pet. App. 148a.

The fact that respondents may have altered their behavior because they genuinely "fear" the possibility that their communications will be incidentally acquired by Section 1881a-authorized surveillance targeting others likewise does not support Article III jurisdiction. "[I]n order to have standing, an individual must present more than '[a]llegations of a subjective "chill."' There must be a 'claim of specific present objective harm or a threat of specific future harm.'" *Bigelow* v. *Virginia*, 421 U.S.

809, 816-817 (1975) (quoting *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972)). In other words, respondents' inability to show an imminent interception of their communications cannot be cured by the asserted chilling effect resulting from their fear of such surveillance.

In *Laird*, the plaintiffs challenged an Army domestic surveillance program, which they claimed had a "'chilling' effect" leading them to cease First Amendment activities. 408 U.S. at 3. The Court noted that the "alleged 'chilling' effect" apparently arose, *inter alia*, from plaintiffs' "apprehensiveness that the Army may at some future date * * * direct[ly] harm" them with information from the program. *Id.* at 13. But the Court held that such "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of * * * a threat of specific future harm" that would support Article III standing. *Id.* at 13-14. As five dissenting judges explained in this case, "*Laird* compels the conclusion * * * that [respondents] lack standing because any chilling of their electronic communications with foreign contacts, including costs incurred in forgoing such communications, arose 'merely' from their knowledge of the existence of a program that they feared could target their contacts." Pet. App. 152a.

The court of appeals attempted to distinguish *Laird* on the ground that respondents "detail specific, reasonable actions that they have taken to their own tangible, economic cost * * * to avoid being overheard in the way that the challenged statute makes reasonably likely." Pet. App. 54a. But respondents' self-imposed harms add nothing to the analysis. A plaintiff's decision to inflict a self-imposed injury because of fear—a fear that itself is insufficient to confer Article III standing

—cannot create a cognizable injury. Adding zero to zero is still zero.

The court of appeals mistakenly relied on *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), and *Meese* v. *Keene*, 481 U.S. 465 (1987), as support for its view that "alter[ing] or ceas[ing] conduct as a reasonable response to the challenged statute" will confer standing. Pet. App. 43a-46a. The "injury in fact" in *Laidlaw* was not the plaintiffs' cessation of activities based on a fear of yet-to-be-taken conduct; it was damage to an area's "aesthetic and recreational value[]" to the plaintiffs, where it was "*undisputed* that Laidlaw's unlawful *conduct*—discharging pollutants [into the water]—was occurring." 528 U.S. at 183-184 (citation omitted; emphasis added). Evidence showing that recreation was reasonably curtailed, the river "looked and smelled polluted," and property values declined served to document the extent of the injury to those "recreational, aesthetic, and economic interests." See *id.* at 181-184. Similarly, in *Keene*, the government had already determined that three specific films Keene wanted to display had to be labeled as foreign "political propaganda." 481 U.S. at 467 & n.1. Keene sought "to enjoin the application of the [labeling statute] to these three films," and he proved (with "detailed affidavits") that the government-required label would cause him actual, "reputation[al]" injury for displaying the films. *Id.* at 468, 473-474 & n.7. That reputational injury from *proven* government conduct "demonstrated *more than* a 'subjective chill.'" *Id.* at 473 (emphasis added). Because *Laidlaw* and *Keene* involved concrete, proven conduct by the defendants and specific injuries other than "chill" that flowed directly from that conduct, they do not support the decision below.

3. The court of appeals' conclusion that respondents' self-imposed fiscal "injury" qualified as an injury in fact led it to err further in finding a "substantial likelihood that the requested relief will remedy" that asserted injury. Pet. App. 41a n.24 (citation omitted). It reasoned that, because "[respondents'] injuries stem from their reasonable fear of being monitored by FAA-authorized government surveillance," their injuries would be redressed by an "injunction prohibiting the government from conducting surveillance under the FAA." *Ibid.* That tautological approach to redressability highlights the speculative nature of respondents' contentions.

First, respondents' claimed present injuries are self-imposed ones that respondents contend are reasonable reactions to reasonable fears. But a court order is not needed to redress any such "injury." Plaintiffs can stop expending funds now and, alternatively, can continue to expend funds even if they prevail in this action.

Second, respondents do not seek to enjoin all possible government surveillance of their contacts abroad. They request an injunction that would stop only "surveillance [conducted] pursuant to the authority granted by section [1881a]." Pet. App. 241a. As Judge Raggi explained, that focus on only one provision authorizing foreign-intelligence surveillance itself undermines redressability: "[I]f the United States intelligence community is as inclined to monitor [respondents' foreign contacts'] communications as [respondents] assert, then enjoining the FAA will merely eliminate one of several means for achieving that objective." *Id.* at 169a; see *id.* at 168a-173a.

FISA, for instance, leaves unregulated multiple means for collecting foreign-intelligence information. Congress intentionally limited FISA's reach by tailoring

its "definition of 'electronic surveillance'" to avoid regulating "international signals intelligence activities" by the NSA and other "electronic surveillance conducted outside the United States." S. Rep. No. 701, 95th Cong., 2d Sess. 71 (1978). In addition, traditional FISA orders can authorize the acquisition (in the United States) of communications by persons abroad who are associated with terrorist groups or other foreign powers. See p. 3, *supra*. Moreover, as respondents describe them, respondents' contacts abroad could well be "prime targets for surveillance by other countries, including their own." Pet. App. 172a (Raggi, J., dissenting). And foreign intelligence services are not bound by the United States Constitution or FISA when collecting intelligence about persons in foreign countries or deciding whether to provide that information to the United States. In short, it is wholly speculative that enjoining use of Section 1881a would likely redress respondents' perceived need to take affirmative measures to prevent surveillance of their international communications.

B. The Court Of Appeals' Holding Creates A Conflict In The Circuits

The D.C. and Sixth Circuits have confronted similar suits challenging the government's authority to conduct intelligence activities, and both have held that the plaintiffs lacked standing because they could not establish that they themselves would be subject to imminent surveillance. Both cases conflict with the decision here.

1. In *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375 (1984), the D.C. Circuit, in an opinion authored by then-Judge Scalia, held that the plaintiffs failed to establish standing to challenge the legality of Executive Order No. 12,333, because they failed to show the "immi-

nence of concrete, harmful action." *Id.* at 1380. The plaintiffs, like respondents, could not prove that they had been surveilled as a "consequence of the [Order]," but argued that (1) "their activities are such that they are especially likely to be targets of the unlawful activities authorized by the order," and that (2) they had curtailed constitutionally protected activities because of "fear" that they would be "targeted for surveillance." *Id.* at 1377, 1380-1381. Indeed, the plaintiffs' claim to standing in *United Presbyterian Church* had an added feature that respondents' claim does not, because the plaintiffs there asserted that they had themselves "been subjected to unlawful surveillance in the past." *Id.* at 1380; see Pet. App. 163a & n.19 (Raggi, J., dissenting).

The D.C. Circuit held that, even assuming that the plaintiffs faced a "greater risk" of surveillance, they failed to show a non-speculative threat of future injury. 738 F.2d at 1380. The Executive Order, the court explained, "does not *direct* intelligence-gathering activities against all persons who could conceivably come within its scope, but merely *authorizes* them." *Ibid.* As such, the plaintiffs' contentions regarding the likelihood of future surveillance were "speculative" and did not prove the requisite "imminence of concrete, harmful action." *Ibid.*

The D.C. Circuit also concluded that the fact that plaintiffs' present activities had been "chilled" did not support standing. Under *Laird*, it explained, a plaintiff must "suffer[] some concrete harm (past or immediately threatened) apart from the 'chill' itself." *United Presbyterian Church*, 738 F.2d at 1378; see *id.* at 1380. In short, a "[c]hilling effect" is not a "*harm* which entitles the plaintiff to [sue]." *Id.* at 1378.

2. In *ACLU* v. *NSA*, 493 F.3d 644, 648 (2007), cert. denied, 552 U.S. 1179 (2008), the Sixth Circuit similarly

held that the plaintiffs failed to establish standing to challenge the Terrorist Surveillance Program (TSP), which authorized the collection of certain international communications into or out of the United States where there were reasonable grounds to believe that at least one party to the communication was a member of, affiliated with, or working in support of al Qaeda or an affiliated terrorist organization.

The *ACLU* plaintiffs asserted, *inter alia*, an "injury based on the increased financial burden they incur in having to travel substantial distances to meet personally with their clients and others relevant to their cases" to avoid TSP surveillance. *ACLU* v. *NSA*, 438 F. Supp. 2d 754, 767 & n.16 (E.D. Mich. 2006), rev'd, 493 F.3d 644 (6th Cir. 2007). That claim is materially the same as respondents' here.[9]

Although each judge in *ACLU* wrote separately, the opinions of Judges Batchelder and Gibbons formed a majority holding that the plaintiffs lacked standing. Judge Batchelder acknowledged the argument that "*immediate* injury result[ed] directly from [plaintiffs'] own

---

[9] In *ACLU*, for instance, attorney Nancy Hollander declared that she "represent[ed] Mohommedou Ould Salahi" (a captured member of al Qaeda) in his habeas corpus petition; needed to "engage in privileged communications" with persons in foreign countries; "believe[d] it is likely that some or all of th[ose] communications will be intercepted"; and had limited her international communications and "instead had to take expensive and time-consuming trips abroad to obtain information." 06-cv-10204 Doc. 4, Exh. J ¶¶ 21, 23-25 (E.D. Mich. Mar. 9, 2006). Respondent Sylvia Royce's declaration is materially indistinguishable: She "also represent[s] Mohommedou Ould Salahi" in the same habeas petition; also claims a need to communicate with persons abroad; "believe[s] that [her] international communications are likely to be acquired under the new law"; and thus "ha[s] to travel to share information" that she deems sensitive. Pet. App. 349a-352a.

actions" taken to reduce the "possibility that [their] private communications" could be intercepted, and that that "injury manifest[ed] itself in * * * a quantifiable way (as the added time and expense of traveling overseas)." 493 F.3d at 654. She also observed that the plaintiffs' stated "well founded belief" that "the NSA is presently intercepting, or will eventually intercept, [their] communications * * * may be reasonable." *Id.* at 655-656; see *id.* at 667. But Judge Batchelder determined that, "[b]ecause there is no evidence that any plaintiff's communications have ever been intercepted," and because the NSA "might *never* actually intercept" any of the plaintiffs' communications, the plaintiffs failed to establish an injury in fact caused by the government. *Id.* at 656, 667. The "anticipated harm," she explained, was "neither imminent nor concrete," but rather was merely "hypothetical, conjectural, or speculative." *Ibid.*

Judge Gibbons likewise acknowledged that "the plaintiffs * * * may have a reasonable fear of harm from the [government's] conduct," but she concluded that, "regardless of how reasonable that fear may be," "a plaintiff must be actually subject to the [government's] conduct, not simply afraid of being subject to it," to sustain a nonspeculative Article III injury. 493 F.3d at 689-690. And because there was "no evidence in the record that any of the plaintiffs are personally subject to the TSP," Judge Gibbons concluded that the plaintiffs lacked standing. *Id.* at 691. Accord *Al-Haramain Islamic Found.* v. *Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007) (holding that plaintiffs could not establish standing to challenge TSP surveillance without proof of such surveillance); *Halkin* v. *Helms*, 690 F.2d 977, 999-1000, 1001-1002 (D.C. Cir. 1982) (same for other surveillance activities).

The court of appeal's reasoning cannot be squared with *United Presbyterian Church* and *ACLU*. Like the programs challenged in those cases, Section 1881a does not require that intelligence-gathering activities be taken against respondents or their overseas contacts. It merely authorizes certain targeting that *may not* target respondents. The court of appeals' speculative reliance on its own asserted "realistic understanding of the world," and its focus on a "reasonable interpretation" of the scope of Section 1881a authority, Pet. App. 38a, cannot be reconciled with the logic of the D.C. and Sixth Circuits, which require non-conjectural, imminent injury.

Judge Lynch acknowledged that the panel opinion he authored was in "tension" with those decisions but concluded, like the panel, that the other circuits' cases were factually distinguishable. Pet. App. 116a (Lynch, J., concurring in denial of rehearing en banc); *id.* at 58a-59a & n.32 (panel). The panel deemed the TSP challenge in *ACLU* to be "narrow[er]" than that here, and the challenge in *United Presbyterian Church* to the Executive Order governing "the entire national intelligence-gathering system" to be broader and less specific. *Ibid.* But those distinctions concerning the breadth of surveillance that might *possibly* occur under a particular authorization do nothing to establish the scope of the activity *actually* conducted. See *id.* at 163a n.19 (Raggi, J., dissenting). The panel's conjecture about the latter directly conflicts with the holdings in both *United Presbyterian Church* and *ACLU*.

C. Review Is Warranted To Resolve An Important And Recurring Threshold Question Governing The Scope Of Federal Jurisdiction

The court of appeals' Article III holding raises exceptionally important questions for the Court's review. If allowed to stand, it will require the lower courts—based on respondents' speculative claims of harm—to adjudicate in the abstract the constitutionality of an Act of Congress governing exceedingly important foreign-intelligence surveillance targeting non-United States persons abroad. That decision is incorrect, has created a circuit conflict, disregards important separation-of-powers principles underlying the standing requirements of Article III of the Constitution, and cleanly presents significant legal issues for this Court's review.

No judge below—not even the panel opinion's author—"dispute[d] the 'exceptional importance'" of the question presented when the court of appeals denied en banc rehearing by an equally divided, six-to-six vote. Pet. App. 135a; see *id.* at 116a, 178a. As five dissenting judges explained, the panel's decision represents an "unprecedented" and "startling" (*id.* at 133a, 178a-179a) expansion of Article III principles that is unfaithful to this Court's standing jurisprudence and conflicts with decisions in other circuits. Those judges took the unusual step of expressing the "hope that [this Court's] doors will be opened for further discussion of this case." *Id.* at 175a (Raggi, J., dissenting).

Although the interlocutory posture of a case is normally a basis to defer review, there are compelling reasons for review in this case at this time. This Court's interlocutory review is warranted if the petition presents an "important and clear-cut issue of law" that "would otherwise qualify as a basis for certiorari" and "is funda-

mental to the further conduct of the case." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (citing cases). That holds particularly true where, as here, the court of appeals' decision disregards at the very threshold of the case the fundamental separation-of-powers principles upon which "the law of Art. III standing is built." *Raines* v. *Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen* v. *Wright*, 468 U.S. 737, 752 (1984)); see, *e.g.*, *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 596-597 (2007) (interlocutory review following court of appeals' reversal of district court's dismissal of constitutional challenge on standing grounds).

The "Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity,'" *Allen*, 468 U.S. at 752 (citation omitted), is particularly salient when a court must discharge "the most important and delicate of its responsibilities": "constitutional adjudication." *Schlesinger*, 418 U.S. at 220-221. The standing inquiry therefore should be "especially rigorous when reaching the merits of the dispute would force [a federal court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-820. Disregarding that admonition, the court of appeals' ruling will require a federal court to adjudicate the constitutionality of Section 1881a *in the abstract*, without the essential assistance of concrete facts concerning any actual, imminent surveillance affecting the persons challenging the law. Review thus is particularly warranted to prevent the extraordinary inconvenience and untoward prospect of continuing the "conduct of the cause" on remand. *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893).

Directing such litigation in the context of an Act of Congress regulating the Nation's exceedingly important need to conduct foreign-intelligence surveillance targeting certain non-United States persons abroad threatens to disrupt important Executive Branch activities protecting the national security. The Court similarly granted the government's interlocutory petition to decide whether the plaintiffs in *Laird* had standing to challenge a domestic intelligence-gathering program that the plaintiffs —like respondents here—feared would cause them harm. No different result is warranted now. This Court's review is warranted at this critical juncture in the litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT S. LITT
General Counsel

TRICIA S. WELLMAN
Deputy General Counsel

BRADLEY A. BROOKER
Associate General Counsel
Office of the Director of National Intelligence

PATRICK J. REYNOLDS
Acting General Counsel

ARIANE E. CERLENKO
Deputy General Counsel
National Security Agency

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

DOUGLAS N. LETTER
DANIEL J. LENERZ
Attorneys

FEBRUARY 2012

APPENDIX

No.

In the Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI (VOLUME 1)

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DOUGLAS N. LETTER
DANIEL J. LENERZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

Volume 1

Appendix A – Court of Appeals Opinion (Mar. 21, 2011) 1a

Appendix B – District Court Opinion (Aug. 20, 2009) 62a

Appendix C – Order denying rehearing (Sept. 21, 2011) 114a

Volume 2

Appendix D – Complaint (filed July 10, 2008) 197a

Appendix E – Declaration of Jameel Jaffer (filed Sept. 12, 2008) 243a

Exhibit A – James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, New York Times (Dec. 16, 2005) 247a

Exhibit B – *The President's Radio Address*, 41 Weekly Comp. Pres. Docs 1880 (Dec. 17, 2005) 262a

Exhibit C – Excerpts from *The President's News Conference*, 41 Weekly Comp. Pres. Docs 1885 (Dec. 19, 2005) 266a

Exhibit D – Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005) 272a

Table of Contents—Continued: Page

Exhibit E – Excerpts from Remarks by General Michael V. Hayden at the National Press Club (Jan. 23, 2006) (full text available at http://www.dni.gov/speeches/printer_friendly/20060123_speech_print.htm) 294a

Exhibit F – Letter from Attorney General Alberto R. Gonzales to Senator Patrick Leahy and Senator Arlen Specter (dated Jan. 17, 2007) 312a

Exhibit G – Chris Roberts, *Transcript: Debate on the Foreign Intelligence Surveillance Act*, El Paso Times (Aug. 22, 2007) 315a

Exhibit H – Mike McConnell, *A Law Terrorism Outran: We Need a FISA For the 21st Century*, Washington Post (May 21, 2007) .. 331a

Appendix F – Declaration of Naomi Klein (filed Sept. 12, 2008) 334a

Appendix G – Declaration of Joanne Mariner (filed Sept. 12, 2008) 340a

Appendix H – Declaration of Sylvia Royce (filed Sept. 12, 2008) 348a

Appendix I – Declaration of John Walsh (filed Sept. 12, 2008) 354a

Appendix J – Declaration of Christopher L. Hedges (filed Dec. 15, 2008) 363a

Table of Contents—Continued: Page

Appendix K – Declaration of Scott McKay (filed Dec. 15, 2008) 368a

Appendix L – Declaration of Professor Stephen Gillers (filed Dec. 15, 2008) (Exhibit A omitted) 376a

Appendix M – Declaration of Steven M. Bellovin (filed Dec. 15, 2008) 389a

Appendix N – Statement of Undisputed Facts in Support of Respondents' Motion for Summary Judgment (filed Sept. 12, 2008) 396a

Appendix O – Petitioners' Response to Respondents' Statement of Undisputed Facts (filed Oct. 28, 2008) 402a

Appendix P – Respondents' Supplemental Statement of Undisputed Facts (filed Dec. 12, 2008) 410a

Appendix Q – Statutory Provisions 415a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 09-4112-cv

AMNESTY INTERNATIONAL USA, GLOBAL FUND FOR WOMEN, GLOBAL RIGHTS, HUMAN RIGHTS WATCH, INTERNATIONAL CRIMINAL DEFENCE ATTORNEYS ASSOCIATION, THE NATION MAGAZINE, PEN AMERICAN CENTER, SERVICE EMPLOYEES INTERNATIONAL UNION, WASHINGTON OFFICE ON LATIN AMERICA, DANIEL N. ARSHACK, DAVID NEVIN, SCOTT MCKAY, SYLVIA ROYCE,
PLAINTIFFS-APPELLANTS

v.

JAMES R. CLAPPER, JR., IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE,*
KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE,
ERIC H. HOLDER, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,
DEFENDANTS-APPELLEES

Argued: Apr. 16, 2010
Decided: Mar. 21, 2011

---

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), James R. Clapper, Jr., the Director of National Intelligence is automatically substituted as a defendant herein for his predecessor. The Clerk of Court is directed to amend the caption to read as shown above.

Before: CALABRESI, SACK, and LYNCH, Circuit Judges.

GERARD E. LYNCH, Circuit Judge:

Attorneys, journalists, and labor, legal, media, and human rights organizations brought this action facially challenging the constitutionality of Section 702 of the Foreign Intelligence Surveillance Act of 1978 ("FISA"), which was added to FISA by Section 101(a)(2) of the FISA Amendments Act of 2008 (the "FAA"), and codified at 50 U.S.C. § 1881a. Section 702 creates new procedures for authorizing government electronic surveillance targeting non-United States persons outside the United States for purposes of collecting foreign intelligence. The plaintiffs complain that the procedures violate the Fourth Amendment, the First Amendment, Article III of the Constitution, and the principle of separation of powers because they "allow[] the executive branch sweeping and virtually unregulated authority to monitor the international communications . . . of law-abiding U.S. citizens and residents."

The merits of the plaintiffs' claims are not before us. The *only* issue presented by this appeal is whether the plaintiffs are legally in a position to assert these claims in a federal court, not whether the claims are to any degree valid. Their merit is an issue for another court on another day. The district court (Koeltl, *J.*) granted the government summary judgment because it found that the plaintiffs lacked standing. On appeal, the plaintiffs argue that they have standing because the FAA's new procedures[1] cause them to fear that their communica-

---

[1] Throughout this opinion, references to the FAA's new procedures challenged by the plaintiffs refer to the procedures set forth in Section 702.

tions will be monitored, and thus force them to undertake costly and burdensome measures to protect the confidentiality of international communications necessary to carrying out their jobs. Because standing may be based on a reasonable fear of future injury and costs incurred to avoid that injury, and the plaintiffs have established that they have a reasonable fear of injury and have incurred costs to avoid it, we agree that they have standing. We therefore reverse the district court's judgment.

BACKGROUND

I. Statutory Scheme at Issue

In 1978, Congress enacted FISA to establish procedures under which federal officials could obtain authorization to conduct electronic surveillance for foreign intelligence purposes, including surveillance of communications between persons located within the United States and surveillance of communications between persons located within the United States and persons located outside the United States.[2] *See* 50 U.S.C.

---

[2] FISA defined electronic surveillance to include:

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that

§§ 1801(f), 1804(a)(6)(A). The 2008 FAA amends FISA. It leaves much of the preexisting surveillance authorization procedure intact, but it creates new procedures for the authorization of foreign intelligence electronic surveillance targeting non-United States persons located outside the United States.[3] *See id.* § 1881a; *see also* 154 Cong. Rec. S227, 228 (daily ed. Jan. 24, 2008) (statement of Sen. Rockefeller) ("[W]e wanted to ensure that activities authorized by this bill are only directed at persons outside the United States. . . . For individuals inside the United States, the existing procedures under FISA continue to apply."). The plaintiffs complain that the new procedures unlawfully permit broader collection of intelligence with less judicial oversight.

---

would be permissible under section 2511(2)(i) of Title 18;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

50 U.S.C. § 1801(f).

[3] "'United States person' means 'a citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power. . . .'" 50 U.S.C. § 1801(i).

A. Surveillance Authorization Procedures Prior to the FAA

FISA established procedures requiring federal officials to obtain authorization to conduct electronic surveillance for foreign intelligence purposes. It created the Foreign Intelligence Surveillance Court ("FISC"), to which the government had to apply for authorization to conduct foreign intelligence surveillance. *See* 50 U.S.C. §§ 1803, 1804.

To obtain authorization, a federal officer had to submit an application, approved by the Attorney General, that included: the identity of the officer making the application; the identity, if known, or a description of, the individual to be monitored by the surveillance ("the target"); the bases for believing both that the target was a foreign power or an agent of a foreign power, and that a foreign power or an agent of a foreign power was using or was about to use each of the facilities at which the surveillance was directed; proposed minimization procedures; the nature of the information sought and the type of communications or activities to be surveilled; a certification that a significant purpose of the surveillance was to obtain foreign intelligence information, and that the information could not reasonably be obtained by normal investigative techniques; the means by which the surveillance would be effected; a description of any previous surveillance applications; and the period during which the surveillance was to be maintained. *Id.* § 1804(a)(1)-(9).

Before approving an application, a FISC judge[4] had to find that: the application met the above criteria; there was probable cause to believe both that the target was a foreign power or an agent of a foreign power and that each of the facilities or places at which the electronic surveillance was directed was being used, or was about to be used, by a foreign power or an agent of a foreign power; and the government's proposed minimization procedures met the standards defined in § 1801(h).[5] *Id.* § 1805(a).

---

[4] The Chief Justice of the United States publicly designates eleven district court judges to serve on the FISC. 50 U.S.C. § 1803(a)(1).

[5] 50 U.S.C. § 1801(h) defines minimization procedures, in relevant part, as:

> (1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;
>
> (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;
>
> (3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes[.]

Section 1801(h) also includes a fourth requirement for minimization procedures that applies to authorization of surveillance directed solely at communications between or among foreign powers. 50 U.S.C.

A FISC judge who approved an application was required to enter an individualized ex parte order that specified (among other things): the identity, if known, or a description of the target; the nature and location of the places to be monitored; the type of information sought to be acquired; the means of surveillance, and the time period for which surveillance was approved. *Id.* § 1805(c)(1). The order also had to direct the government to follow the approved minimization procedures. *Id.* § 1805(c)(2)(A). During the authorized surveillance period, the FISC could monitor compliance with these minimization procedures "by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated." *Id.* § 1805(d)(3).

B. Surveillance Authorization Procedures After the FAA

The FAA leaves much of the FISA framework intact, but the new Section 702 creates new procedures for the authorization of foreign intelligence surveillance targeting non-United States persons located outside the United States.

The FAA, in contrast to the preexisting FISA scheme, does not require the government to submit an individualized application to the FISC identifying the particular targets or facilities to be monitored. Instead, the Attorney General ("AG") and Director of National Intelligence ("DNI") apply for a mass surveillance authorization by submitting to the FISC a written certification and supporting affidavits attesting generally that

---

§§ 1801(h)(4), 1802. The fourth requirement does not pertain to the type of foreign intelligence surveillance plaintiffs challenge.

"a significant purpose of the acquisition is to obtain foreign intelligence information" and that that information will be obtained "from or with the assistance of an electronic communication service provider." 50 U.S.C. § 1881a(g)(2)(A)(v), (vi). The certification must also attest that adequate targeting and minimization procedures have been approved by the FISC, have been submitted to the FISC for approval, or are being submitted with the certification. *Id.* § 1881a(g)(2)(A)(i), (ii). "Targeting procedures" are procedures designed to ensure that an authorized acquisition is "limited to targeting persons reasonably believed to be located outside the United States," and is designed to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." *Id.* § 1881a(d)(1), 1881a(g)(2)(A)(i). "Minimization procedures" for electronic surveillance under the FAA must meet the definition of minimization procedures for electronic surveillance under FISA, set out in 50 U.S.C. § 1801(h). The government's certification must further attest that the surveillance procedures, which must be included with the certification, comply with the Fourth Amendment. *Id.* § 1881a(g)(2).

In addition, the certification must attest that the surveillance complies with statutory limitations providing that it:

> (1) may not intentionally target any person known at the time of acquisition to be located in the United States;
>
> (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particu-

> lar, known person reasonably believed to be in the United States;
>
> (3) may not intentionally target a United States person reasonably believed to be located outside the United States;
>
> (4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and
>
> (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

50 U.S.C. § 1881a(b); *see also id.* § 1881a(g)(2)(A)(vii).

The FISC must review the government's certification, and targeting and minimization procedures, and if it finds that the certification includes all of the required elements, it must issue an order authorizing the government to conduct the requested surveillance. *Id.* § 1881a(i)(2), 1881a(i)(3)(A). At that point, the AG and DNI "may authorize jointly, for a period of up to 1 year . . . , the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." *Id.* § 1881a(a).[6]

If the FISC rejects an application, the government may appeal the denial to the Court of Review. *Id.* § 1881a(i)(4)(A). During the pendency of that appeal, including any subsequent rehearing en banc, the govern-

---

[6] In exigent circumstances, the government may start wiretapping before applying for FISC authorization, so long as the government applies to the FISC for authorization within seven days. 50 U.S.C. § 1881a(c)(2), 1881a(g)(1)(B).

ment may continue to conduct the requested surveillance. *Id.* § 1881a(i)(4)(B).

Under the FAA, in contrast to the preexisting FISA scheme, the FISC may not monitor compliance with the targeting and minimization procedures on an ongoing basis. Instead, that duty falls to the AG and DNI, who must submit their assessments to the FISC, as well as the congressional intelligence committees and the Senate and House Judiciary Committees. *Id.* § 1881a(*l*)(1). In its summary judgment submissions, the government asserted that "[s]hould such reporting reveal particular minimization procedures to be ineffective in any respect, the FISC has the authority to disapprove such procedures in future § 1881a proceedings." Defs.' Mem. in Opp'n to Pls.' Mot. for Summ. J. at 52-53, *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009) (No. 08 Civ. 6259). But the government has not asserted, and the statute does not clearly state, that the FISC may rely on these assessments to revoke earlier surveillance authorizations.

The head of each element of the intelligence community acquiring communications by means of authorized surveillance also must review the ongoing surveillance procedures by conducting "an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition." 50 U.S.C. § 1881a(*l*)(3)(A). These reviews of authorized acquisitions must indicate how many United States persons were overheard or were referred to in intercepted communications that were collected under surveillance designed to target non-United States

persons.[7] The relevant intelligence heads who conduct such annual reviews must use them "to evaluate the adequacy of the minimization procedures," *id.* § 1881a(*l*)(3)(B), and they must provide these annual reviews to the FISC, the AG, the DNI, the congressional intelligence committees, and the Senate and House Judiciary Committees, *id.* § 1881a(*l*)(3)(C).

C. Comparison of Pre- and Post-FAA Surveillance Authorization Procedures

The plaintiffs highlight two differences between the pre- and post-FAA surveillance authorization procedures. First, whereas under the preexisting FISA scheme the government had to submit an individualized application for surveillance identifying the particular target, facility, type of information sought, and procedures to be used, under the FAA, the government need not submit a similarly individualized application—it need not identify the particular target or facility to be monitored. *Compare* 50 U.S.C. § 1805(c)(1), *with id.* § 1881a(d)(1), 1881a(g)(4). Second, whereas under the preexisting FISA scheme the FISC had to find probable cause to believe both that the surveillance target is a "foreign power" or agent thereof and that the facilities to be monitored were being used or about to be used by a foreign power or its agent, under the FAA the FISC no longer needs to make any probable-cause determination at all. Instead, the FISC simply verifies that the

---

[7] More specifically, the FAA requires that these reviews provide, inter alia, a count of "disseminated intelligence reports containing a reference to a United States-person identity" and "the number of [surveillance] targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed." 50 U.S.C. § 1881a(*l*)(3)(A).

government has made the proper certifications. *Compare* 50 U.S.C. § 1805(a)(2)(A), *with id.* § 1881a(i)(3)(A).

In practice, these new authorization procedures mean that surveillance orders can be significantly broader under the FAA than they previously could have been. Prior to the FAA, surveillance orders could only authorize the government to monitor specific individuals or facilities. Under the FAA, by contrast, the plaintiffs allege that an acquisition order could seek, for example, "[a]ll telephone and e-mail communications to and from countries of foreign policy interest—for example, Russia, Venezuela, or Israel—including communications made to and from U.S. citizens and residents." Moreover, the specific showing of probable cause previously required, and the requirement of judicial review of that showing, have been eliminated. The government has not directly challenged this characterization.[8]

An additional distinction concerns who monitors compliance with statutory limitations on the surveillance procedures. The preexisting FISA scheme allowed ongoing judicial review by the FISC. *Id.* § 1805(d)(3). But under the FAA, the judiciary may not monitor compliance on an ongoing basis; the FISC may review the minimization procedures only prospectively, when the government seeks its initial surveillance authorization. Rather, the executive—namely the AG and DNI—bears the responsibility of monitoring ongoing compliance,

---

[8] In its brief, the government says that it "disputes" the plaintiffs' interpretation of "the *scope* of [the FAA]," but it does not identify what is wrong with the plaintiffs' interpretation, or what a more appropriate interpretation would be. At oral argument, we asked the government to clarify what it found inaccurate in the plaintiffs' characterization, and again it failed to do so.

and although the FISC receives the executive's reports, it cannot rely on them to alter or revoke its previous surveillance authorizations. *Compare* 50 U.S.C. § 1805(d)(3), *with id.* § 1881a(g)(2)(A)(i), (ii), 1881a(*l*).

II. Prior Proceedings

A. Parties

The plaintiffs are attorneys and human rights, labor, legal, and media organizations whose work requires international communications with individuals they believe the government will likely monitor under the FAA.[9] The plaintiffs sued the DNI, the AG, and the Director of the National Security Agency ("NSA") in their official capacities (collectively, "the government").

B. Complaint

On July 10, 2008, the same day Congress enacted the FAA, the plaintiffs filed their complaint alleging that the FAA "allows the executive branch sweeping and virtually unregulated authority to monitor the international communications . . . of law-abiding U.S. citizens and residents." The plaintiffs alleged that they feared that under the FAA the government would intercept their sensitive international communications that were necessary to carrying out their jobs, and that they therefore had to take costly and burdensome measures to protect the confidentiality of those communications. They sought declaratory and injunctive relief, alleging that the FAA facially violates the Fourth Amendment, the First Amendment, Article III of the Constitution, and the principle of separation of powers.

---

[9] The nature of and need for these communications with such individuals is fleshed out below.

C. Summary Judgment Filings

In September and October 2008, the parties cross-moved for summary judgment. The plaintiffs sought a declaration that the FAA is unconstitutional. The government, in addition to defending the FAA's constitutionality on the merits, argued that the plaintiffs lacked standing to challenge the facial validity of the statute, contending that the Act could be challenged only by persons who had been electronically surveilled in accordance with its terms and the plaintiffs could not show that they had been so surveilled. The plaintiffs advanced what they characterized as two independent bases for standing to challenge the FAA's constitutionality: first, that they have an actual and well-founded fear that their communications will be monitored in the future; and, second, that in light of that fear they have taken costly and burdensome measures to protect the confidentiality of certain communications.

In support of their standing arguments, the plaintiffs filed declarations and a Statement of Undisputed Facts pursuant to Local Rule 56.1 ("56.1 Statement"). The plaintiffs' evidence tended to show that their work "requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, journalistic sources, witnesses, experts, foreign governmental officials, and victims of human rights abuses located outside the United States."[10] The individuals with whom the plaintiffs communicate include "people the U.S. Government believes or believed to be associated with terrorist organizations," "political and human rights activists who oppose governments

[10] As more fully discussed below, the government does not dispute the accuracy of plaintiffs' factual assertions.

that are supported economically or militarily by the U.S. government," and "people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts."[11]

---

[11] The plaintiffs submitted a number of declarations providing examples of such individuals: Attorney Scott McKay, for instance, communicates with his client Sami Omar Al-Hussayen, a Saudi Arabian resident who has faced criminal charges in connection with the September 11 terrorist attacks and is now a defendant in several related civil cases. McKay also helps represent Khalid Sheik Mohammed, who is being held at Guantanamo Bay for alleged acts of terrorism, and in the course of this representation McKay regularly communicates with Mohammed's family members, experts, and investigators around the world. Attorney Sylvia Royce represents Mohammedou Ould Salahi, a Mauritanian national and Guantanamo Bay prisoner, who allegedly acted as a liaison between al Qaeda and German Islamic radicals. Royce communicates information about Salahi's case with his brother in Germany, and with her Mauritanian and French co-counsel.

Attorney Joanne Mariner, who directs Human Rights Watch's Terrorism and Counterterrorism Program, which reports on human rights abuses by governments and non-state actors throughout the world, regularly speaks with human rights researchers, translators, former detainees, and political activists in locations including Jordan, Egypt, Pakistan, Afghanistan, and the Gaza Strip, often in an effort to locate individuals who the CIA has alleged are associated with terrorist organizations, or individuals whom the CIA has detained and allegedly tortured. John Walsh, who conducts research and advocacy on U.S. policy toward the Andes region for the Washington Office on Latin America ("WOLA"), testifies that WOLA relies on, inter alia, Cuban sources who are outspoken critics of the U.S. embargo.

Journalist Naomi Klein reports on a wide variety of international topics, and in order to do so she communicates with sources abroad, including Mexican individuals regarding military activity in Chiapas, Argentinian advocates for indigenous rights, and indigenous Colombian groups who oppose U.S. trade policies. Likewise, journalist Chris Hedges, whose writing focuses on American and Middle Eastern politics and society, maintains regular contact with academics, journalists,

The plaintiffs assert that in their electronic communications with these individuals they exchange information that "constitutes 'foreign intelligence information' within the meaning of the FAA." The plaintiffs believe that, because of the nature of their communications with these individuals, the communications will likely be "acquired, retained, analyzed, and disseminated" under the FAA.

Their fear of future surveillance, according to the plaintiffs, inflicts present injuries. For instance, in order to protect the confidentiality of sensitive and privileged communications the plaintiffs have "ceased engaging in certain conversations on the telephone and by e-mail," which, in turn, "compromises [their] ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and to engage in other legitimate and constitutionally protected communications." In addition, the FAA has "force[d] plaintiffs to take costly and burdensome measures," such as traveling long distances to meet personally with individuals.

The attorney plaintiffs assert that they are obligated to take these measures in order to comply with their "ethical obligation to avoid communicating confidential information about client matters over telephone, fax, or e-mail if they have reason to believe that it is likely to be intercepted by others." In support of this assertion, the plaintiffs filed a declaration from Professor Stephen

---

politicians, and activists in places such as Iran, Syria, Libya, Kosovo, Bosnia, and Sudan. He also communicates with political activists and civil society leaders in Palestine, whom he believes are "of interest" to the U.S. government.

Gillers, an expert in legal ethics, stating that it is "the duty of a lawyer to safeguard confidential information."

Gillers attested that "[d]eterminative of how the lawyer may proceed is . . . whether the lawyer has good reason to believe that his or her communications are reasonably likely to be intercepted, even if the interception is lawful." He then opined that the FAA gives the attorneys sufficient reason to believe their communications will be intercepted:

> My opinion is that the lawyers have good reason for this belief [that their communications with clients and third parties in connection with client matters will be intercepted] because of the status of their clients, the identity and location of witnesses and sources, and the broad authority that the FAA grants the government. The lawyers' decision to avoid electronic means of communication is not discretionary. It is obligatory.[12]

The government did not submit any evidence of its own either in opposition to the plaintiffs' submissions, or in support of its own summary judgment motion. Additionally, at oral argument on the summary judgment motions, the government said it accepted the factual

---

[12] It is undisputed and indisputable that attorneys have an ethical duty to avoid disclosure of confidential information relating to the representation of clients. However, to the extent that Professor Gillers declares that the FAA creates a sufficient risk of interception to trigger that ethical duty, that assertion relies on his analysis of how the FAA operates, which we are not compelled to accept. It is for us to determine whether it is reasonable for the attorneys (and other plaintiffs, for that matter) to alter their behavior based on their fear that their communications will be intercepted. That is, ultimately, a legal determination on which we need not accept, even for purposes of summary judgment, the correctness of plaintiffs' submissions.

submissions of the plaintiffs as true for purposes of those motions. *Amnesty Int'l*, 646 F. Supp. at 641. We therefore must accept the plaintiffs' evidence as undisputed explanations of how the FAA has affected them.[13]

D. District Court's Summary Judgment Opinion

The district court held that the plaintiffs lacked standing to challenge the FAA, and therefore granted summary judgment for defendants without reaching the merits of the plaintiffs' claims. After identifying the three constitutional requirements for standing—an injury in fact, a causal connection between the injury and the challenged statute, and redressability—the court stated that "[t]his case turns on whether the plaintiffs have met the irreducible constitutional minimum of personal, particularized, concrete injury in fact." *Id.* at 643-

---

[13] At oral argument on this appeal, the government professed itself "puzzled" as to why the plaintiffs had not been just as nervous about being monitored before the FAA was enacted as they are now. To the extent that that statement questioned whether the plaintiffs genuinely fear being monitored after the FAA's enactment more than they did before it, the government cannot raise that challenge on appeal. The plaintiffs' 56.1 Statement said that "[t]he threat of surveillance under the new law has a much greater impact on [their] work than previous U.S. government surveillance." The time to challenge the accuracy of the plaintiffs' assertions in their declarations has passed. The government could have filed its own evidence, or sought an evidentiary hearing on the accuracy of the plaintiffs' claims, but it did neither. *See Gubitosi v. Kapica*, 154 F.3d 30, 31 n.1 (2d Cir. 1998) (deeming admitted all material facts contained in an unopposed Rule 56.1 statement); *see also* S.D.N.Y. Local R. 56.1(c) ("Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.").

44. The court denied standing because it found that neither of the plaintiffs' asserted injuries—their actual and well-founded fear of being monitored, and the resulting professional and economic costs they have incurred to protect the confidentiality of their communications—constituted the requisite injury in fact.

1. Fear of Future Surveillance

The district court found the plaintiffs' fear of future surveillance too speculative to confer standing. It stated:

> The plaintiffs have failed to establish standing to challenge the constitutionality of the FAA on the basis of their fear of surveillance. The plaintiffs can only demonstrate an abstract fear that their communications will be monitored under the FAA. The FAA creates a framework within which intervening federal officials may apply for approval from the FISC to authorize surveillance targeting non-United States persons located outside the United States to acquire foreign intelligence information. The FAA sets forth the requirements that an application to obtain a surveillance order from the FISC must satisfy. Contrary to the characterization of the statute in the plaintiffs' motion papers, the FAA itself does not authorize the surveillance of the plaintiffs' communications. Indeed, the FAA neither authorizes surveillance nor identifies on its face a class of persons that includes the plaintiffs. Rather the FAA authorizes specified federal officials to seek a surveillance order from the FISC. That order cannot target the plaintiffs and whether an order will be sought that affects the plaintiffs' rights, and whether

> such an order would be granted by the FISC, is completely speculative.

Id. at 645.

To arrive at this conclusion, the district court relied on three lines of cases. First, the court looked to cases where plaintiffs have sought standing to challenge electronic surveillance schemes, namely *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), and *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007). Both of these cases rejected the plaintiffs' standing arguments, which were based on their fear of future injuries, because the plaintiffs' respective fears were too speculative. The district court found those cases apposite and persuasive. *See Amnesty Int'l*, 646 F. Supp. 2d at 645-47.

Second, the court examined "'physical surveillance cases' where the Supreme Court reached the merits of challenges to laws or policies authorizing drug or alcohol testing for specific classes of persons, without requiring that the plaintiffs had actually submitted to such testing before bringing such challenges." *Id.* at 647-48. The district court held that those cases have "no application to this case, where the plaintiffs are not required to do anything or to submit to anything, and where there is no showing that the Government has authorized any action against [a class of persons including] the plaintiffs." *Id.* at 648.

Finally, the district court examined standing cases outside the surveillance context, and said those cases:

> stand for the proposition that a plaintiff may challenge a specific law or regulation before it is enforced against the plaintiff if the plaintiff is subject

> to that law or regulation and has a well-founded fear that it will be so enforced. The plaintiffs in this case have made no showing that they are subject to any specific law or regulation that they seek to challenge. The FAA does not require that the plaintiffs do anything or refrain from doing anything such that they might have a well-founded fear that the Government would take action against them for failing to abide by the statute. Moreover, the FAA does not authorize surveillance of the plaintiffs' communications and the plaintiffs have made no showing that the Government has sought any such surveillance pursuant to the general framework set forth in the statute or that such surveillance has been authorized.

Id. at 649.

2. Economic and Professional Costs Incurred to Protect Communications

As for the plaintiffs' economic and professional costs, the court found that those injuries are "not truly independent of the [plaintiffs'] first basis" for standing, because those costs "flow directly from the plaintiffs' fear of surveillance." *Id.* at 653. The court said that "[t]o allow the plaintiffs to bring this action on the basis of such costs would essentially be to accept a repackaged version of the first failed basis for standing." *Id.* Moreover, the court held that "because the plaintiffs have failed to show that they are subject to the FAA and that they face a threat of harm from its enforcement, the chilling of their speech that they attribute to the statute is actually the result of their purely subjective fear of surveillance." *Id.* The court went on to state that the Supreme Court has held in *Laird v. Tatum*, 408 U.S. 1

(1972), that such a subjective chill "is insufficient to support standing." *Amnesty Int'l*, 646 F. Supp. 2d at 653.

DISCUSSION

This opinion addresses only the question of whether plaintiffs have standing to challenge the FAA. It does not address the FAA's constitutionality. The district court did not reach that issue, and the parties did not brief it. The question before this Court is only whether the plaintiffs may maintain this lawsuit, a question that "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). "We review questions of standing *de novo*." *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010).

I. *Elements and Principles of Standing*

Article III of the United States Constitution empowers federal courts to hear only "cases" and "controversies." U.S. Const. art. III, § 2. Standing doctrine determines "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III," and is therefore "entitled to have the court decide the merits of the dispute or of particular issues." *Warth*, 422 U.S. at 498; *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). A citizen who dislikes a particular law may not require a court to address its constitutionality simply by stating in a complaint his belief, however deeply held, that the law is inconsistent with some provision of the Constitution. "[T]he [Supreme] Court has rejected all attempts to substitute abstract concern with a subject . . . for the concrete injury required by Art. III." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 410 (1980) (internal quotation

marks omitted) (citing cases); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974).

The plaintiff must be affected by the law in some concrete way. "Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger*, 418 U.S. at 220-21. The critical question is whether "the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (internal quotation marks and alterations omitted).

The Supreme Court has said that "the irreducible constitutional minimum of standing contains three elements":

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.[14] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

---

[14] Where a plaintiff seeks injunctive relief, he must show that he is "under threat of suffering [an] injury in fact," a requirement that is discussed more fully below. *Summers*, 129 S. Ct. at 1149 (internal quotation marks omitted).

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and punctuation omitted); *accord Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. These requirements "assure[] that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Summers*, 129 S. Ct. at 1148 (internal quotation marks omitted).

Standing doctrine serves a number of purposes. The Supreme Court has said standing is "built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). "[T]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 598 (2007) (internal quotation marks omitted). By limiting the exercise of judicial review of other branches of government to cases where it is necessary to protect a complaining party's interests, standing doctrine is "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498. If we had no standing doctrine and instead simply allowed the courts to "oversee legislative or executive action," that would "significantly alter the allocation of power away from a democratic form of government." *Summers*, 129 S. Ct. at 1149 (internal quotation marks and ellipsis omitted).

Standing doctrine also serves to improve judicial decision-making by ensuring that a concrete case informs the court of the consequences of its decisions, and by ensuring that the party bringing the case has "such

a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962); *see also Lujan*, 504 U.S. at 581 (Kennedy, *J.*, concurring in part) (standing requirements "preserve[] the vitality of the adversarial process by assuring both that the parties before the court have an actual . . . stake in the outcome, and that the legal questions presented will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action" (internal quotation marks and ellipsis omitted)).[15]

II. *Plaintiffs' Asserted Grounds for Standing*

On appeal, the plaintiffs reassert that they have suffered two types of injuries. First, they claim that they fear that the government will intercept their sensitive international communications, because the FAA "plainly

---

[15] Standing has been said to serve a number of other values, as well, including: promoting judicial efficiency and effectiveness by preventing the courts from being overwhelmed with cases where plaintiffs have only an ideological stake, *see United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, *J.*, concurring) ("[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens."); and promoting fairness, by ensuring that plaintiffs enforce only their own rights rather than third parties' rights, *see Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) ("First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights." (citation omitted)).

authorizes the acquisition of [their] international communications," and their communications are "likely to be monitored under it." Second, they claim that anticipation of this future injury also inflicts a present injury "by compelling them to take costly and burdensome measures to protect the confidentiality of their international communications" and by compromising their "ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and to engage in other legitimate and constitutionally protected communications."

The district court and the parties have focused on whether the plaintiffs' asserted injuries satisfy the injury-in-fact component of the standing inquiry. Although they are correct that the plaintiffs' first asserted injury—the possibility of being monitored in the future —raises a question of injury in fact, because probabilistic injuries constitute injuries in fact only when they reach a certain threshold of likelihood, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983), the plaintiffs' second asserted injury alleges the most mundane of injuries in fact: the expenditure of funds. The plaintiffs' declarations, which, as discussed above, we must accept as true, establish that they have already incurred professional and economic costs to avoid interception. Having accepted the truthfulness of the plaintiffs' declarations for purposes of the summary judgment motion, the government cannot now dispute whether the plaintiffs genuinely fear being intercepted, or whether the plaintiffs have actually incurred the costs they claim to have incurred. Thus, we have little doubt that the plaintiffs have satisfied the injury-in-fact requirement.

As to the second asserted injury—their present-injury theory—that the plaintiffs have demonstrated injuries in fact is not sufficient in itself to establish standing. The plaintiffs must also prove that the injuries are caused by the challenged statute and that a favorable judgment would redress them. The government's challenge to the plaintiffs' standing based on their incurred professional and economic costs focuses on whether there is a "causal connection between [the plaintiffs'] injury and the [legislation] complained of." *Lujan*, 504 U.S. at 560. The causal chain can be broken where a plaintiff's self-inflicted injury results from his "unreasonable decision . . . to bring about a harm that he knew to be avoidable." *St. Pierre v. Dyer*, 208 F.3d 394, 403 (2d Cir. 2000). However, "[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own injury. . . . Standing is defeated only if it is concluded that the injury is so completely due to the plaintiff's own fault as to break the causal chain." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.5, at 361-62 (3d ed. 2008) (footnotes omitted).

If the plaintiffs can show that it was not unreasonable for them to incur costs out of fear that the government will intercept their communications under the FAA, then the measures they took to avoid interception can support standing. If the possibility of interception is remote or fanciful, however, their present-injury theory fails because the plaintiffs would have no reasonable basis for fearing interception under the FAA, and they cannot bootstrap their way into standing by unreasonably incurring costs to avoid a merely speculative or highly unlikely potential harm. Any such costs would be gratuitous, and any ethical concerns about not taking

those measures would be unfounded. In other words, for the purpose of standing, although the plaintiffs' economic and professional injuries are injuries in fact, they cannot be said to be "fairly traceable" to the FAA—and cannot support standing—if they are caused by a fanciful, paranoid, or otherwise unreasonable fear of the FAA. "If causation is to be required at all, it should demand a meaningful level of probability," but "[a]s with other elements of standing, the showing required might be tailored to the other facts that make it more or less appropriate to decide the case." Wright, Miller & Cooper, *supra*, § 3531.5, at 328.

Here, the plaintiffs' actions were "fairly traceable" to the FAA. Because, as we shall explain, the plaintiffs' fears were reasonable even under the stringent reasonableness standards found in *future-injury* cases, and because the plaintiffs incurred these professional and economic costs as a direct result of that reasonable fear, their present injuries in fact clearly satisfy the requirements for standing. We therefore need not and do not decide whether the degree of likelihood necessary to establish a causal relationship between an actual present injury and the challenged governmental action is as stringent as that necessary for a potential harm in itself to confer standing. However, the line of future-injury standing cases provides a helpful framework for analyzing the plaintiffs' present-injury arguments. Those cases bolster our conclusion that the professional and economic harms the plaintiffs suffered here were fairly traceable to the FAA, and were not the result of an "unreasonable decision" on their part "to bring about a harm that [they] knew to be avoidable." *St. Pierre*, 208 F.3d at 403.

In addition to their present-injury theory, the plaintiffs advance a future-injury theory of standing. A future injury or threat of injury does not confer standing if it is "conjectural or hypothetical" and not "real and immediate." *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (internal quotation marks omitted). To determine whether the plaintiffs have standing under their future-injury theory, we would need to determine whether the FAA creates an objectively reasonable likelihood that the plaintiffs' communications are being or will be monitored under the FAA. As noted above, we conclude that the future injuries alleged by the plaintiffs are indeed sufficiently likely to confer standing under the test established in the case law for basing standing on the risk of future harm.

The government's first argument against the plaintiffs' standing—on both theories—is that the FAA does not create a sufficiently high likelihood that those communications will be monitored. In our judgment, however, for the reasons set forth in Part III, below, the plaintiffs have established that they reasonably fear being monitored under the allegedly unconstitutional FAA, and that they have undertaken costly measures to avoid it. Those present injuries—fairly traceable to the FAA and likely to be redressable by a favorable judgment—support the plaintiffs' standing to challenge the statute.

The government next argues that the plaintiffs lack standing because any injury they suffer is indirect. That is, the government contends that because the FAA does not directly target the plaintiffs, any injury the plaintiffs suffer is a result of their reaction to the government's potential monitoring of third parties. The government

essentially argues that this indirectness defeats the plaintiffs' standing because it attenuates the causal chain linking the plaintiffs' injuries to the FAA. For the reasons set forth in Part IV, below, we disagree.

III. *Likelihood of Government Action*

The government argues that the plaintiffs can obtain standing only by showing either that they have been monitored or that it is "effectively certain" that they will be monitored. The plaintiffs fall short of this standard, according to the government, because they "simply speculate that they will be subjected to governmental action taken pursuant to [the FAA]."

But the government overstates the standard for determining when a present injury linked to a contingent future injury can support standing. The plaintiffs have demonstrated that they suffered present injuries in fact—concrete economic and professional harms—that are fairly traceable to the FAA and redressable by a favorable judgment. The plaintiffs need not show that they have been or certainly will be monitored. Indeed, even in cases where plaintiffs allege an injury based solely on prospective government action, they need only show a "realistic danger" of "direct injury," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); and where they allege a prospective injury to First Amendment rights, they must show only "'an actual and well-founded fear'" of injury, *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000), quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988), an arguably less demanding standard.[16]

---

[16] For a comparison of the "realistic danger" and "well-founded fear" standards, *see Amnesty Int'l*, 646 F. Supp. 2d at 644 n.12. We do not

A. Standard

When a plaintiff asserts a *present* injury based on conduct taken in anticipation of *future* government action, we evaluate the likelihood that the future action will in fact come to pass. To determine whether the present injury "fairly can be traced to the challenged [future] action," *see Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976), we must consider whether a plaintiff's present injury resulted from some irrational or otherwise clearly unreasonable fear of future government action that is unlikely to take place. Such a disconnect between the present injury and predicted future government action would break the causal chain required for standing.

In this context, cases that discuss whether a potential *future* harm is sufficiently likely such that the chance of that future harm constitutes an injury in fact can provide some guidance for determining whether the plaintiffs have satisfied the causation requirement for standing where their assertions of present and ongoing injuries stem, in part, from a desire to avoid potential future injuries.[17]

---

discuss the distinction here, because it does not determine the outcome of this case.

[17] By analyzing the plaintiffs' allegations of present injury in terms of cases relating to future harms, we do not suggest that actual present injuries may only be traced to governmental action when the causal connection is as strong as the likelihood of injury required to base standing on contingent future harms. Rather, we use those cases, and the stringent reasonableness standards they impose for future-injury standing, to demonstrate just how strong the plaintiffs' present-injury standing claims here truly are.

In *Lyons*, the seminal case on standing based on probabilistic or prospective harm, the plaintiff sued the City of Los Angeles and certain police officers alleging that officers stopped him for a traffic violation and, without provocation, applied a chokehold, rendering him unconscious and damaging his larynx. *Lyons*, 461 U.S. at 97-98. In addition to seeking damages, he sought to enjoin police officers' use of chokeholds. *Id.* at 98.

The Court said, "Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers," *id.* at 105, emphasizing that "[t]he reasonableness of [the plaintiff's] fear [of future injury] is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Id.* at 107 n.8 (emphasis in original).

The Court held that Lyons lacked standing to pursue injunctive relief, because he did not show a sufficient likelihood that he would be injured. *Id.* at 111-12. It said, "[w]e cannot agree that the odds that Lyons would not only again be stopped for a traffic violation but would also be subjected to a chokehold without any provocation whatsoever are sufficient to make out a federal case for equitable relief." *Id.* at 108 (internal citation and quotation marks omitted). Without a "sufficient likelihood that he will again be wronged in a similar way," Lyons was "no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional." *Id.* at 111.

Although the plaintiff in *Lyons* lacked standing, that case clearly articulated the principle that a plaintiff may obtain standing by showing a sufficient likelihood of future injury. Indeed, the Court stated that Lyons would have established standing if he had been able to allege facts that would have made his injury sufficiently likely—such as another encounter with the police or a city policy authorizing police officers to engage in the conduct he feared.[18]

This Court has articulated the principle of *Lyons* as requiring an inquiry into the probability of future harm. In *Curtis v. City of New Haven*, 726 F.2d 65 (2d Cir. 1984), where plaintiffs sought to enjoin police officers' use of mace in certain circumstances because officers stopped them, maced them, and gave them no treatment afterward, we denied standing, holding that "the Court made clear in *Lyons* that the critical inquiry is the *likelihood* that these plaintiffs will again be illegally assaulted with mace." *Id.* at 68 (emphasis supplied).[19]

---

[18] The Court stated:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner.

Lyons, 461 U.S. at 105-06.

[19] For examples of cases where courts have granted standing based on probabilistic injuries, *see Davis v. FEC*, 554 U.S. 724, 735 (2008) (granting standing to congressional candidate to challenge campaign finance law that raised restrictions on contributions to competitors in certain circumstances, despite the fact that the raised restrictions had not yet been triggered when plaintiff filed suit, because "the record at

Assessing whether a threatened injury, by itself, is sufficiently probable to support standing is a "qualitative, not quantitative" inquiry that is "highly case-specific." *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003) (internal quotation marks omitted). "[T]he question of whether anticipated future injury suffices to establish standing is approached as a question of judgment and degrees." Wright, Miller & Cooper, *supra*, § 3531.4, at 264. Indeed, in future-injury cases, we have said that "the risk of harm necessary to support standing cannot be defined according to a universal standard." *Baur*, 352 F.3d at 637.

One factor that bolsters a plaintiff's argument that the injury is likely to come to pass, according to both the Supreme Court and this Court, is the existence of a pol-

---

summary judgment indicated that most candidates who had the opportunity to receive expanded contributions had done so"); *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) ("The likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury to satisfy Art. III's requirement that a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." (internal quotation marks and bracket omitted)); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74 (1978) (granting plaintiffs standing to challenge statute that capped liability for nuclear reactor accidents, because statute created incentives for defendant to build and operate nearby nuclear reactor that would release small quantities of radiation into the air and water, and injury from that radiation was "uncertain[ ]" but sufficiently likely); *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003) (granting plaintiff standing to challenge regulation that allowed downed cattle to be processed for human consumption, because it increased chances of plaintiff contracting disease from such meat).

icy that authorizes the potentially harmful conduct.[20] However, the cases do not establish any talismanic, dispositive facts a plaintiff must plead in order to establish a certain threshold of probability. Some cases suggest that the risk of that harm need not be particularly high. *See Massachusetts v. EPA*, 549 U.S. 497, 525 n.23 (2007) (quoting *Vill. of Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993), as holding that "even a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical"). The probability required "logically varies with the severity of the probable harm." *Baur*, 352 F.3d at 637. Ultimately, courts consider the totality of the circumstances, and where a "plaintiff's interpretation of a statute is 'reasonable enough' and under that

---

[20] *See Lyons*, 461 U.S. at 106 (Lyons would have had standing if he could have alleged that he would have another encounter with the police and "that the City ordered or authorized police officers to act in such manner."); *Baur*, 352 F.3d at 637 (granting plaintiff standing primarily on two "critical factors": (1) government studies and comments confirmed several of the plaintiff's central allegations; and (2) his "alleged risk of harm arises from an established government policy"); *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 345 (2d Cir. 1998) (finding standing for plaintiffs—a certified class of children arrested on possible delinquency charges who challenged the policies and practices of a detective squad's interrogation of children facing possible delinquency charges—in part because the challenged interrogation methods "are officially endorsed policies," which creates "a likelihood of recurring injury because the Squad's activities are authorized by a written memorandum of understanding between the Corporation Counsel and the Police Commissioner"); *Curtis*, 726 F.2d at 68 (denying plaintiffs standing because no city policy authorized police officers to act the way the plaintiffs alleged they had acted, and the "plaintiffs have not alleged that it is likely that they will be stopped by City police in the future and, for no reason and without provocation, assaulted with mace and not given treatment afterward").

interpretation the plaintiff 'may legitimately fear that it will face enforcement of the statute,' then the plaintiff has standing to challenge the statute." *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008), quoting *Vt. Right to Life*, 221 F.3d at 383.

B. *Application*

The plaintiffs have established that they suffered *present* injuries in fact—economic and professional harms—stemming from a reasonable fear of *future* harmful government conduct. They have asserted that the FAA permits broad monitoring through mass surveillance orders that authorize the government to collect thousands or millions of communications, including communications between the plaintiffs and their overseas contacts. The FAA is susceptible to such an interpretation, and the government has not controverted this interpretation or offered a more compelling one.[21]

It is significant that the injury that the plaintiffs fear results from conduct that is authorized by statute. This case is not like *Lyons*, where the plaintiff feared injury from officers who would have been acting outside the law, making the injury less likely to occur. Here, the fact that the government has authorized the potentially harmful conduct means that the plaintiffs can reasonably assume that government officials will actually engage in that conduct by carrying out the authorized sur-

---

[21] At oral argument, the government contended that required minimization procedures combined with the fact that the government must convince an Article III judge to approve any surveillance order "makes less certain the injury here." This line of argument might shed light on the merits—on whether the government surveillance authorized by the FAA is consistent with the Constitution—but it does not directly dispute the plaintiffs' interpretation of the FAA's scope.

veillance. It is fanciful, moreover, to question whether the government will ever undertake broad-based surveillance of the type authorized by the statute. The FAA was passed specifically to permit surveillance that was not permitted by FISA but that was believed necessary to protect the national security. *See, e.g.*, 154 Cong. Rec. S227, 227-28 (daily ed. Jan. 24, 2008) (statement of Sen. Rockefeller) (explaining "why it is necessary for us to update" FISA); *id.* at 235 (statement of Sen. Hutchison) (explaining why surveillance authorization procedures must be updated). That both the Executive and the Legislative branches of government believe that the FAA authorizes new types of surveillance, and have justified that new authorization as necessary to protecting the nation against attack, makes it extremely likely that such surveillance will occur.

Furthermore, the plaintiffs have good reason to believe that their communications, in particular, will fall within the scope of the broad surveillance that they can assume the government will conduct. The plaintiffs testify that in order to carry out their jobs they must regularly communicate by telephone and e-mail with precisely the sorts of individuals that the government will most likely seek to monitor—i.e., individuals "the U.S. government believes or believed to be associated with terrorist organizations," "political and human rights activists who oppose governments that are supported economically or militarily by the U.S. government," and "people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts." The plaintiffs' assessment that these individuals are likely targets of FAA surveillance is reasonable, and the government has not disputed that assertion.

On these facts, it is reasonably likely that the plaintiffs' communications will be monitored under the FAA. The instant plaintiffs' fears of surveillance are by no means based on "mere conjecture," delusional fantasy, or unfounded speculation. *Baur*, 352 F.3d at 636 (to establish standing, a plaintiff "must allege that he faces a direct risk of harm which rises above mere conjecture"). Their fears are fairly traceable to the FAA because they are based on a reasonable interpretation of the challenged statute and a realistic understanding of the world. Conferring standing on these plaintiffs is not tantamount to conferring standing on "any or all citizens who no more than assert that certain practices of law enforcement offices are unconstitutional." *Lyons*, 461 U.S. at 111. Most law-abiding citizens have no occasion to communicate with suspected terrorists; relatively few Americans have occasion to engage in international communications relevant to "foreign intelligence." These plaintiffs however, have successfully demonstrated that their legitimate professions make it quite likely that their communications will be intercepted if the government—as seems inevitable—exercises the authority granted by the FAA.

The government argues the plaintiffs have failed to establish standing because the FAA does not itself authorize surveillance, but only authorizes the FISC to authorize surveillance. As a result, the government says the plaintiffs must speculate about at least two intervening steps between the FAA and any harm they might suffer as a result of the government conducting surveillance: first, that the government will apply for surveillance authorization under the FAA, and, second, that the FISC will grant authorization.

But this argument fails. The presence of an intervening step does not, as a general rule, by itself preclude standing.[22] Nor do the particular intervening steps the government identifies here—the government's seeking authorization and the FISC's approving it—preclude standing. With respect to the first step, as discussed above, it is more than reasonable to expect that the government will seek surveillance authorization under the FAA. We therefore cannot say that uncertainty about this step significantly attenuates the link between the FAA and the plaintiffs' harms.

Nor does the second intervening step add significant uncertainty. As discussed above, under the FAA the FISC must enter an order authorizing surveillance if the government submits a certification that conforms to the statutory requirements. *See* 50 U.S.C. § 1881a(g)(2)(A), 1881a(i)(3)(A). The FAA does not require or even permit the FISC to make an independent determination of

---

[22] *See, e.g., Massachusetts v. EPA*, 549 U.S. at 516-26 (granting plaintiff-state standing to challenge EPA's failure to regulate greenhouse gas emissions from new vehicles because those emissions contribute to global warming, which contributes to a rise in sea level, which causes more frequent and severe flooding, which damages coastal infrastructure); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 678, 683-90 (1973) (granting plaintiffs standing to challenge increase in railroad rate because it would decrease use of recycled products, which would adversely affect environment near plaintiffs and would impair plaintiffs' use of nearby forests, streams, and mountains); *Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) ("A plaintiff may satisfy the causation requirement if the complaint avers the existence of an intermediate link between the state regulations and the injury." (internal quotation marks and brackets omitted)); *Baur*, 352 F.3d at 641 (granting plaintiff standing despite the fact that a "chain of contingencies may need to occur" for plaintiff to sustain feared injury).

the necessity or justification for the surveillance. It verges on the fanciful to suggest that the government will more than rarely fail to comply with the formal requirements of the FAA once it has decided that the surveillance is warranted.

Empirical evidence supports this expectation: in 2008, the government sought 2,082 surveillance orders, and the FISC approved 2,081 of them. We do not know how many of these applications, if any, came after the FAA was enacted on July 10, 2008. At the very least, though, the evidence does not show that the FISC actually rejects a significant number of applications for FAA surveillance orders.[23] Without a stronger showing that the FISC interposes a significant intervening step, we cannot find that the mere existence of this intervening step prevents the plaintiffs from obtaining standing to challenge the FAA.

Because the plaintiffs' undisputed testimony clearly establishes that they are suffering injuries in fact, and because we find those injuries are causally connected to the FAA—because they are taken in anticipation of future government action that is reasonably likely to

---

[23] Moreover, under the FAA the government can often conduct surveillance without FISC authorization. In exigent circumstances, for example, the government may start wiretapping before applying for FISC authorization, so long as the government applies for authorization within 7 days. 50 U.S.C. § 1881a(c)(2), 1881a(g)(1)(B). In addition, if the FISC denies any application for a surveillance order, the government may conduct the applied-for surveillance while it appeals the FISC denial. 50 U.S.C. § 1881a(i)(4)(B).

occur—and are redressable by a favorable judgment,[24] we find the plaintiffs have standing.

IV. Indirectness of Harm

The plaintiffs' asserted economic and professional costs incurred to protect the confidentiality of their communications can be characterized as indirect injuries, because the FAA does not target the plaintiffs themselves and the plaintiffs incur injuries due to their responses, and the responses of the third-party individuals with whom they communicate, to the anticipated FAA-authorized surveillance of those individuals. The government argues that the indirectness of these injuries defeats the plaintiffs' standing. We disagree.

A. Standard

The Supreme Court has made clear that "when the plaintiff is not himself the object of the government ac-

---

[24] Neither the district court nor the parties discuss the third constitutional standing requirement—redressability—in any depth. To demonstrate redressability, "a plaintiff must show the substantial likelihood that the requested relief will remedy the alleged injury in fact." *McConnell v. FEC*, 540 U.S. 93, 225-26 (2003), *overruled on other grounds by Citizens United v. FEC*, 130 S. Ct. 876 (2010); *see also Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself."). The requirement turns on the "causal connection between the alleged injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). The plaintiffs have established that the relief they seek would redress their asserted injuries in fact, because their injuries stem from their reasonable fear of being monitored by FAA-authorized government surveillance, and if a court grants their requested relief—an injunction prohibiting the government from conducting surveillance under the FAA—the feared surveillance would no longer be permitted and therefore would, presumably, no longer be carried out.

tion or inaction he challenges, standing is not precluded." *Summers*, 129 S. Ct. at 1149 (2009) (internal quotation marks, brackets, and citation omitted); *see also Lujan*, 504 U.S. at 562; *accord Garelick v. Sullivan*, 987 F.2d 913, 919 (2d Cir. 1993) ("A plaintiff does not lack standing merely because her injury is an indirect product of the defendant's conduct."). But a plaintiff who is indirectly harmed by a regulation needs to show more than does a plaintiff who is directly regulated by the challenged law:

> When the suit is one challenging the legality of government action . . . , the nature and extent of facts that must be averred (at the summary judgment stage) . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action . . . at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation . . . of *someone else*, much more is needed.

Lujan, 504 U.S. at 561-62 (emphasis in original). It is therefore "ordinarily substantially more difficult" to establish standing based on indirect injuries than on direct injuries. *Summers*, 129 S. Ct. at 1149 (internal quotation marks omitted).

As a fundamental requisite to establishing standing, a plaintiff seeking standing on the basis of indirect injury must satisfy the three constitutional requirements for standing discussed above: (1) an injury in fact (2) that is causally related to the challenged statute or conduct and (3) is likely to be redressed by a favorable

judicial decision. *See Lujan*, 504 U.S. at 560-61; *Duke Power*, 438 U.S. at 72. Despite not being directly regulated, a plaintiff may establish a cognizable injury in fact by showing that he has altered or ceased conduct as a reasonable response to the challenged statute. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 184-85 (2000) (granting environmental groups standing to sue a corporation under the Clean Water Act because the defendant corporation's alleged environmental damage deterred members of the plaintiff organizations from using and enjoying certain lands and rivers). If the plaintiff makes such an allegation, he must identify the injury with "specificity," *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314, 1319 (1974) (Marshall, *Circuit Justice*), and he "must proffer some objective evidence to substantiate his claim that the challenged conduct has deterred him from engaging in protected activity," *Bordell v. Gen. Elec. Co.*, 922 F.2d 1057, 1061 (2d Cir. 1991).

The plaintiffs have satisfied these requirements through their uncontroverted testimony that they have altered their conduct and thereby incurred specific costs in response to the FAA. As discussed above, we must accept that undisputed testimony, so the plaintiffs have established the first constitutional requirement for standing—an injury in fact.

The heart of the government's challenge to the plaintiffs' standing based on the indirectness of their injury —much like the government's challenge to the plaintiffs' standing based on the likelihood of future injury—goes to whether the plaintiffs' injuries are causally connected to the challenged legislation. The causal chain linking the plaintiffs' indirect injuries to the challenged legisla-

tion is similar to that discussed above: it turns on the likelihood that the plaintiffs' communications with the regulated third parties will be monitored. If the FAA does not make it likely that the plaintiffs' communications with regulated third parties will be monitored, then the costs the plaintiffs have incurred to avoid being monitored are the product of their own decisions and are not sufficiently linked to the FAA; for this reason, they would not be "fairly traceable to the challenged action," *Lujan*, 504 U.S. at 560. Conversely, if the plaintiffs' communications with regulated third parties will likely be monitored despite the fact that the FAA does not directly regulate the plaintiffs, then those costs are sufficiently tied to the FAA to support standing.

The Supreme Court and this Court have frequently found standing on the part of plaintiffs who were not directly subject to a statute, and asserted only indirect injuries. Most notably, in *Meese v. Keene*, 481 U.S. 465 (1987), the Supreme Court found standing in a plaintiff who, like the instant plaintiffs, was not directly regulated by the statute, and alleged only indirect injuries. The plaintiff, a lawyer and state legislator, challenged a statute that required certain films to be labeled "political propaganda." *Id.* at 467. The district court in that case made clear that "[a]ccording to the authoritative agency interpretation of the Act and the regulations, plaintiff [wa]s free to remove the ['political propaganda'] label before exhibiting the films." *Keene v. Smith*, 569 F. Supp. 1513, 1516 (E.D. Cal. 1983); *see also id.* at 1519 ("[P]laintiff has no obligation with respect to the label, and . . . is free to remove the label if he chooses."). Hence, as in the instant case, the *Meese* statute did not directly regulate the plaintiff or require him to do, or refrain from doing, anything at all. The *Meese* plaintiff,

however, was injured indirectly. He wanted to show three labeled films, but because he did "not want the Department of Justice and the public to regard him as the disseminator of foreign political propaganda," he abstained from screening the films. *Meese*, 481 U.S. at 467-68. He sued to enjoin the application of the statute to these films.

That the statute did not regulate him directly was no barrier to standing. The Court found he had established a cognizable harm by alleging "the need to take . . . affirmative steps to avoid the risk of harm to his reputation." *Id.* at 475. This reaction was reasonable and was causally linked to the statute, because the plaintiff averred, with support from expert affidavits, that if he showed the films "his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." *Id.* at 473. The Court approved the district court's conclusion that "the Act puts the plaintiff to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation." *Id.* at 475 (internal quotation marks omitted). Either way, the statute affected him in such a way as to give him standing to challenge it.

More recently, in *Friends of the Earth v. Laidlaw*, the Supreme Court recognized plaintiffs' standing to challenge a corporation's alleged Clean Water Act violation. The plaintiffs did not claim that the defendant took direct actions against them. Instead, they showed that because they feared exposure to the defendant's pollution they had ceased to engage in certain recreational activities in the area, such as swimming, camping, and birdwatching. *Friends of the Earth*, 528 U.S. at 181-82.

The Court found that the plaintiffs' decision to curtail those activities was "enough for injury in fact," and found that the plaintiffs' reactions were reasonable responses to the threat of exposure to pollution. *Id.* at 183-85.[25]

These cases establish that a plaintiff has standing to challenge a statute that does not regulate him if he can show that the statute reasonably caused him to alter or cease certain conduct. In the instant case, the key to determining whether the plaintiffs have standing based on the indirect injuries they suffer is determining whether someone who wants to protect the privacy of his communications would reasonably take the measures these plaintiffs took not to be overheard.

---

[25] For other examples of cases finding standing in plaintiffs who were not directly regulated by the statutes they challenged and who asserted indirect injuries, *see Massachusetts v. EPA*, 549 U.S. at 521-26 (granting State of Massachusetts standing to challenge EPA's refusal to regulate greenhouse gas emissions because those emissions contribute to global warming, which contributes to a rise in sea level, which causes more frequent and severe flooding, which damages coastal infrastructure); *Duke Power*, 438 U.S. at 73-78 (granting organizations and individuals standing to challenge statute that capped liability for nuclear reactor accidents, because statute created incentives for defendant to build and operate nearby nuclear reactor that would release small quantities of radiation that would potentially have aesthetic, environmental, and health affects); *SCRAP*, 412 U.S. at 678, 683-90 (granting environmental group standing to challenge increase in railroad rate because it would decrease use of recycled products, which would adversely affect environment near plaintiffs and would impair plaintiffs' use of nearby forests, streams, mountains); *Baur*, 352 F.3d at 632-36 (granting individual standing to challenge FDA regulations of meat producers and processors based on alleged increased risk of contracting a foodborne illness).

B. Application

First, it is reasonable for the plaintiffs to take measures to avoid being overheard. The plaintiffs have established that, because of their legitimate needs to communicate with persons who will likely be subject to government surveillance under the FAA, they are likely to be monitored. Moreover, the various groups of plaintiffs—attorneys, journalists, and human rights, labor, legal, and media organizations—have established that they have legitimate interests in not being monitored. Since the plaintiffs allege that the FAA is unconstitutional, if the plaintiffs' legal theory is correct, any search authorized by the FAA would be an illegal search that the plaintiffs would reasonably try to avoid.[26]

Moreover, each of the plaintiffs has alleged that the risk of being monitored causes additional injuries beyond the mere fact of being subjected to a putatively unconstitutional invasion of privacy. The risk of being monitored by the government threatens the safety of their sources and clients, impedes their ability to do their jobs, and implicates the attorneys' ethical obligations. Journalists Klein and Hedges, for example, assert that if their communications with their sources were overheard, those sources' identities, political activities, and other sensitive information would be disclosed, which would expose them to violence and retaliation by their own governments, non-state actors, and the U.S.

---

[26] We emphasize again that we express no view with respect to the ultimate correctness of the plaintiffs' argument that the FAA violates the Constitution. The only issue here is whether the plaintiffs have standing to present their argument to a court. That question requires us to ask whether the statute, if it is unconstitutional, would inflict any injury on the plaintiffs.

government. Likewise, attorney Mariner asserts that if her communications with human rights abuse victims on behalf of Human Rights Watch are monitored, the victims will draw unwanted attention to themselves and might risk further abuse. Attorneys Royce and McKay, who represent Guantanamo Bay prisoners and others, assert that they risk disclosing litigation strategies to the opposing party (the U.S. government) and violating ethical obligations if their communications with co-counsel, clients and their family members, experts, and investigators around the world are monitored.[27] The plaintiffs act reasonably in trying to avoid these injuries.

Since it is reasonable for the plaintiffs to seek to avoid being monitored, we must consider whether the particular measures they took were reasonable. They were. In some instances the plaintiffs did not communicate certain information they otherwise would have communicated by e-mail or telephone; and in other instances they incurred the costly burdens of traveling to communicate or to obtain that information in person rather than electronically. These are not overreactions to the

---

[27] Both the attorneys and the non-attorneys have reason to fear being monitored under the challenged statute, so both categories of plaintiffs are justified in taking measures to avoid this injury. The attorneys argue that their ethical duty obligates them to incur these expenses. That is true, but it does not entitle the attorneys to special treatment in this standing inquiry. The attorneys' ethical duty is triggered only when the risk of surveillance reaches a certain threshold of likeliness. But when that threshold is met, as it has been here, the non-attorney plaintiffs also have reason to fear being monitored, and they are equally justified in taking measures to avoid what they contend is an illegal search. The fact that an ethical obligation compels the attorneys to take avoidance measures does not mean that their taking those measures, in itself, is any more reasonable than the other plaintiffs taking similar measures for reasons other than ethical concerns.

FAA; they are appropriate measures that a reasonably prudent person who plausibly anticipates that his conversations are likely to be monitored, and who finds it important to avoid such monitoring, would take to avoid being overheard. The plaintiffs have therefore established that those injuries are linked to the statute they challenge.

In sum, the FAA has put the plaintiffs in a lose-lose situation: either they can continue to communicate sensitive information electronically and bear a substantial risk of being monitored under a statute they allege to be unconstitutional, or they can incur financial and professional costs to avoid being monitored. Either way, the FAA directly affects them.[28]

The Supreme Court has said that "the gist of the question of standing" is whether "the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker*, 369 U.S. at 204. The instant plaintiffs are not merely random citizens, indistinguishable from any other members of the public, who want to test in court the abstract theory that the FAA is inconsistent with the Constitution; rather, these plaintiffs have shown that, regardless of which course of action they elect, the FAA affects them. We therefore con-

---

[28] *See Meese*, 481 U.S. at 475 (approving the district court's analysis that the plaintiffs have met the standing requirement, in part, because the challenged statute "puts the plaintiff to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation." (internal quotation marks and citation omitted)).

clude that they have a sufficient "personal stake" to challenge the FAA. That does not mean that their challenge will succeed; it means only that the plaintiffs are entitled to have a federal court reach the merits of their challenge. We need not "decide whether appellants' allegations . . . will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it." *Baker*, 369 U.S. at 208.

V. Laird v. Tatum

The government's principal arguments against the above analysis rest on a single case, *Laird v. Tatum*, 408 U.S. 1 (1972). *Laird* is unquestionably relevant to this case, as it is the only case in which the Supreme Court specifically addressed standing to challenge a government surveillance program. Because *Laird* significantly differs from the present case, however, we disagree with the government's contention that *Laird* controls the instant case, and that *Laird* created different and stricter standing requirements for surveillance cases than for other types of cases.

In *Laird*, the plaintiffs challenged a surveillance program that authorized the Army to collect, analyze, and disseminate information about public activities that had potential to create civil disorder. The Army collected its data from a number of sources, but most of it came from "the news media and publications in general circulation" or from "agents who attended meetings that were open to the public and who wrote field reports describing the meetings." *Laird*, 408 U.S. at 6. The Court noted that the court of appeals had characterized the information gathered as "nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications

available on any newsstand." *Id.* at 9 (internal quotation marks omitted). Roughly sixty government agents around the country participated in the surveillance program. *Id.* at 6-7.

The plaintiffs sought to enjoin the program. They claimed that they "disagree[d] with the judgments" made by the Executive Branch about the scope of the surveillance program, *id.* at 13, and they argued that "in the future it is possible that information relating to matters far beyond the responsibilities of the military may be misused by the military to [their] detriment," *id.* at 9. But the Court stated that the plaintiffs

> [did] not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground. Rather, [the plaintiffs] contend[ed] that the present existence of this system of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitute[d] an impermissible burden on [them] and other persons similarly situated which exercise[d] a present inhibiting effect on their full expression and utilization of their First Amendment rights.

Id. at 10 (internal quotation marks omitted).

The Court noted the court of appeals's observation that the plaintiffs "have some difficulty in establishing visible injury. . . . They freely admit that they complain of no specific action of the Army against them . . . There is no evidence of illegal or unlawful surveillance activities." *Id.* at 9 (citation and alteration omitted). The Court stated that any alleged chilling effect arose from the plaintiffs' "perception of the system as inappropriate to the Army's role under our form of govern-

ment," or the plaintiffs' "beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector," or the plaintiffs' "less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents." *Id.* at 13. Moreover, the Court noted that the plaintiffs had cast "considerable doubt" on whether the surveillance program had actually chilled them, *id.* at 13 n.7, and the plaintiffs did not identify any concrete harm inflicted by the program.

The Court therefore considered:

> whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, *without more*, of a governmental investigative and datagathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.

408 U.S. at 10 (emphasis supplied).

The Court denied plaintiffs standing. It held that the plaintiffs' complaints about "the very existence of the Army's data-gathering system" and their "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14. The Court noted that although previous cases have found governmental regulations unconstitutional based on their "chilling" effect,

> [i]n none of these cases, however, did the chilling effect arise merely from the individual's knowledge

> that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.

Id. at 11.

The government argues that "[t]his case is directly governed by *Laird*," because the only specific present harms the plaintiffs allege flow from a subjective chill. *Laird*, however, differs dramatically from this case.

In *Laird*, the plaintiffs did not clearly allege any injuries whatsoever. They did not claim that the government surveillance they sought to challenge, which relied principally on monitoring through publicly available sources activities conducted entirely in public, harmed them. They did not claim that they, or anyone with whom they regularly interacted, would be subject to any illegal or unconstitutional intrusion if the program they challenged was allowed to continue. Rather, they claimed only that they *might* be injured *if* the information lawfully collected by the military were misused in some unspecified way at some unspecified point in the future, and they alleged that the surveillance scheme had a chilling effect, while essentially admitting that they themselves had not been chilled, and that the program had not altered their behavior in any way.

By contrast, the instant plaintiffs clearly have alleged specific and concrete injuries. Unlike the *Laird* plaintiffs, they do not challenge a program of information gathering that they concede is lawful, on the theory that the information gathered may be misused in the future by government agents acting illegally and without authorization; rather, they challenge a specific statute that expressly authorizes surveillance that they contend is in itself unconstitutional. They do not vaguely allege that they might be subject to surveillance under the program; rather, they set forth specific, concrete reasons to believe they are likely to be overheard, because their legitimate activities bring them into contact with the very types of people who are the professed targets of the statutorily authorized surveillance. And far from alleging an undefined "chill" that has not affected their own behavior in any way, they detail specific, reasonable actions that they have taken to their own tangible, economic cost, in order to carry out their legitimate professional activities in an ethical and effective manner, which can be done only by taking every precaution to avoid being overheard in the way that the challenged statute makes reasonably likely.[29]

This case is a far cry from *Laird*. In this case, as demonstrated above, the plaintiffs allege injuries that

---

[29] *See Socialist Workers Party*, 419 U.S. at 1319 (Marshall, *Circuit Justice*) (holding that, as distinguishable from *Laird*, the plaintiffs' allegations were specific enough to satisfy the "threshold jurisdictional question" of standing because "the allegations are much more specific: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some [Young Socialist Alliance] delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance.").

establish their standing consistent with the standing jurisprudence of the Supreme Court and this Court. In *Laird*, by contrast, the plaintiffs alleged no such injuries. Indeed, because the *Laird* plaintiffs offered so little by way of concrete injury, direct or indirect, *Laird* has little or nothing to say about the critical issue in this case: the reasonableness of the plaintiffs' fear of future injury from the FAA, and the causal relation of the challenged statute to the tangible costs the plaintiffs claim they have incurred.

The government next argues, however, that even if *Laird* does not directly govern this case, it created special standing rules for surveillance cases that are stricter than those that apply to other types of cases, and that those special rules preclude standing in this case. We disagree.

First, the government argues that under *Laird* a plaintiff may challenge a surveillance statute only if he is "subject to" that statute, meaning that he belongs to a narrow class of individuals the statute, on its face, identifies as targets. In support of this claim, the government relies on *Laird*'s comment that some previous plaintiffs who obtained standing to challenge a regulation that did not explicitly target them were able to do so because they were or would soon be "subject to the regulations, proscriptions, or compulsions" they challenged. *Id.* at 11. The government thus argues that the instant plaintiffs cannot obtain standing to challenge the FAA, because the FAA "does not direct intelligence gathering activities against the plaintiffs. Nor does it authorize plaintiffs to be targeted."[30]

---

[30] The government points out that certain of our sister circuits have read *Laird* to have created such a requirement in surveillance cases.

Second, the government argues that *Laird* precludes standing based on chilling-effect injuries. The government notes that the *Laird* plaintiffs alleged that the existence of the Army's surveillance program produced a chilling effect upon the exercise of their First Amendment rights, and the Court rejected that allegation as a ground for standing. The government adopts *United Presbyterian*'s interpretation of *Laird*, which says that in order to obtain standing plaintiffs must show that they "suffer[] some concrete harm (past or immediately threatened) *apart from* the 'chill' itself," such as denial of admission to the bar or termination of employment. *United Presbyterian*, 738 F.2d at 1378 (emphasis supplied).[31] Relying on this interpretation of *Laird*, the gov-

---

See ACLU v. NSA, 493 F.3d at 661 (Batchelder, *J.*, lead opinion) ("[T]o allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill."); *Id.* at 688 (Gibbons, *J.*, concurring) (noting that "the plaintiffs have failed to provide evidence that they are personally subject to the" surveillance program"); *United Presbyterian*, 738 F.2d at 1738 (noting that the plaintiffs are not subject to the challenged regulation because "Executive Order No. 12333 issues no commands or prohibitions to these plaintiffs, and sets forth no standards governing their conduct"); *Id.* at 1380 ("[H]ere, as in [*Laird*], no part of the challenged scheme imposes or even relates to any direct governmental constraint upon the plaintiffs. . . . "). Similarly, in the instant case, the district court held that "[w]ithout showing that they are subject to the statute they seek to challenge, the plaintiffs' fear that they will suffer harm from that statute is speculative and hypothetical." *Amnesty Int'l*, 646 F. Supp. 2d at 647.

[31] The government also cites *ACLU v. NSA* for a similar interpretation of *Laird*. *See ACLU v. NSA*, 493 F.3d at 660 (Batchelder, *J.*, lead opinion) ("I cannot subscribe to a view that the reason the injury in *Laird* was insufficient was because the plaintiffs alleged 'only' chilled

ernment dismisses the economic and professional costs the plaintiffs have incurred because they "flow directly from the 'subjective chill' on plaintiffs' speech caused solely by the existence of [the FAA]." The government says those injuries are "nothing more than a repackaged version of the 'subjective chill' that the Supreme Court found insufficient to establish standing in *Laird*."

We are not persuaded that *Laird* created either of these special standing rules for surveillance cases. Since *Laird* is the only Supreme Court precedent in which a plaintiff who had not been surveilled claimed standing to challenge a surveillance scheme, it is natural to look to it for guidance. However, the government reads far more into *Laird* than either its facts or its language permit. In doing so, it loses sight of the general principles of standing.

First, the *Laird* plaintiffs so obviously lacked standing that the Court did not need to create stricter standing rules in the surveillance context in order to deny plaintiffs standing. The *Laird* plaintiffs identified no injury that they had suffered or would likely suffer. In the absence of any clear alleged injury, the Court could not find that the plaintiffs had satisfied the normal standing requirements, and it therefore did not need to invent new rules to reach that outcome. As we have demonstrated at length above, the facts of *Laird* are simply not comparable to those presented in the instant case. That the *Laird* plaintiffs were held to lack standing does not imply that the instant plaintiffs similarly have failed to allege injury. Any statement in *Laird* of

---

speech and that, by something 'more,' the *Laird* Court meant more subjective injury or other injuries that derive from the chilled speech.").

a general rule applicable to all surveillance cases could only be dictum.

Second, *Laird* in fact contains no such purported special rules for surveillance cases. Nothing in *Laird* supports the conclusion that the Court intended to change the standing rules, nor does it explain any need to create standing rules for surveillance cases distinct from the rules applicable in other contexts. To the contrary, *Laird*'s final sentence makes clear that the result in that case was dictated by the well-established general principles of standing:

> [T]here is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Laird, 408 U.S. at 16. The language quoted by the government—that some previous plaintiffs who obtained standing to challenge a regulation were or would soon be "subject to the regulations, proscriptions, or compulsions" they challenged, *id.* at 11—does not purport to establish a fixed requirement for standing in the surveillance context or in any other; it merely contrasts the situation of the *Laird* plaintiffs with those of other plaintiffs who were found to have standing.

Third, while the government relies heavily on *ACLU v. NSA* and *United Presbyterian* to support its interpretation of *Laird*, those cases do not bind us, and they are factually distinguishable from the instant case.[32] More-

---

[32] In *ACLU v. NSA*, the plaintiffs challenged a narrow surveillance program that monitored particular individuals the government sus-

over, we do not find their interpretations of *Laird* to be persuasive. They read *Laird* essentially the same way the government does, without explaining why we should read *Laird* to have ratcheted up the standing requirements in surveillance cases, sub silentio, where the plaintiffs at issue clearly lacked standing under the normal rules. We do not see any reason why the law of standing should be stricter or different in the surveillance context, and those cases do not offer any such reasons.

Under the traditional, well-established rules of standing, the plaintiffs here have alleged that they reasonably anticipate direct injury from the enactment of the FAA because, unlike most Americans, they engage in legitimate professional activities that make it reasonably likely that their privacy will be invaded and their conversations overheard—unconstitutionally, or so they argue—as a result of the surveillance newly authorized by the FAA, and that they have already suffered tangible, indirect injury due to the reasonable steps they have undertaken to avoid such overhearing, which would

---

pected were associated with al Qaeda. 493 F.2d at 647 (Batchelder, *J.*, lead opinion). The FAA, by contrast, authorizes a considerably broader surveillance program. This fact increases the likelihood that the instant plaintiffs will be harmed in the future, which is a key consideration in determining whether the plaintiffs should have standing to challenge the underlying statute. In *United Presbyterian*, the plaintiffs challenged an executive order that, inter alia, established procedures for the FBI and other intelligence agencies to divide their overlapping surveillance duties. The D.C. Circuit said the plaintiffs essentially challenged the "constitutionality of the entire national intelligence-gathering system." 738 F.2d at 1381. But, unlike the instant plaintiffs, the *United Presbyterian* plaintiffs failed to establish any particular risk that they would be surveilled under the executive order they challenged. *Id.* at 1380.

impair their ability to carry out those activities. Nothing more is required for standing under well-established principles. And nothing in *Laird*, where the plaintiffs alleged no comparable injury, purports to change those principles.[33]

CONCLUSION

The plaintiffs' uncontroverted testimony that they fear their sensitive international electronic communications being monitored and that they have taken costly measures to avoid being monitored—because we deem that fear and those actions to be reasonable in the circumstances of this case—establishes injuries in fact that we find are causally linked to the allegedly unconstitu-

---

[33] We are not alone in so reading *Laird*. *See Socialist Workers Party*, 419 U.S. at 1318 (Marshall, *Circuit Justice*) ("The Government has contended that under *Laird*, a chilling effect will not give rise to a justiciable controversy unless the challenged exercise of governmental power is regulatory, proscriptive, or compulsory in nature, and the complainant is either presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging. In my view, the Government reads *Laird* too broadly. In the passage relied upon by the Government, the Court was merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not." (internal quotation marks and citations omitted)); *see also Meese*, 481 U.S. at 472-74 (*Laird*'s prohibition of standing based on "subjective chill" does not preclude standing for plaintiff who alleged that his showing of films was chilled by a statute that required certain films to be labeled "political propaganda."); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522-23 (9th Cir. 1989) (holding *Laird* does not apply where the alleged effect of INS surveillance on churches is "not a mere subjective chill" on worship activities but is "concrete, . . . distinct and palpable"); *Ozonoff v. Berzak*, 744 F.2d 224, 229-30 (1st Cir. 1984) (Breyer, *J.*) (*Laird* permitts [*sic*] standing when the challenged activity "reasonably [leads] [plaintiff] to believe" he must alter his behavior).

tional FAA. We therefore find that plaintiffs have standing to challenge the constitutionality of the FAA in federal court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 08 Civ. 6259 (JGK)

AMNESTY INTERNATIONAL USA, ET AL.,
PLAINTIFFS,

v.

JOHN MCCONNELL, ET AL., DEFENDANTS

Filed: Aug. 20, 2009

OPINION AND ORDER

JOHN G. KOELTL, District Judge:

This is a facial challenge to the constitutionality of Section 702 of the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. § 1881a, which was added to FISA by Section 101(a)(2) of the FISA Amendments Act of 2008 (the "FAA"). In relevant part, the FAA amended FISA by creating a new framework within which federal officials may seek approval from the Foreign Intelligence Surveillance Court (the "FISC") to authorize surveillance targeting non-United States persons located outside the United States to acquire foreign intelligence information.

The plaintiffs are attorneys and organizations in the United States whose work necessitates international

communications with people and organizations they believe to be likely targets of surveillance under the FAA. The defendants are the Director of National Intelligence, the Director of the National Security Agency and Chief of the Central Security Service, and the Attorney General of the United States.[1]

The plaintiffs fear that their international communications will be monitored under the FAA. They make no claim that their communications have yet been monitored, and they make no allegation or showing that the surveillance of their communications has been authorized or that the Government has sought approval for such surveillance. However, the plaintiffs assert that they have an "actual and well-founded fear" of surveillance under the FAA and claim already to have incurred significant costs in taking steps to protect their international communications from surveillance. The plaintiffs challenge the FAA as unconstitutional under the Fourth Amendment, the First Amendment, and Article III of the Constitution.

The Government contends as a threshold matter that the plaintiffs lack standing to challenge the FAA. The Government also contends that the lawsuit lacks merit in any event because the FAA is constitutional on its face.

The parties have filed cross-motions for summary judgment. For the reasons explained below, the plaintiffs have failed to show that they have standing to bring their facial challenge to the statute.

---

[1] Attorney General Eric H. Holder, Jr., should be automatically substituted for former Attorney General Michael B. Mukasey as a defendant, and the caption of this case changed accordingly. *See* Fed. R. Civ. P. 25(d).

I

A

Prior to the passage of the FAA, FISA created a framework for federal officials to apply for and obtain orders authorizing electronic surveillance where a significant purpose of the surveillance was to obtain foreign intelligence information. *See* 50 U.S.C. § 1804; *see also United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984).[2] FISA established the FISC, comprised of judges appointed by the Chief Justice of the United States, with jurisdiction to hear applications for and to grant orders approving electronic surveillance "in aid of protecting the United States against attack by foreign governments or international terrorist groups." *United States v. Rahman*, 861 F. Supp. 247, 249 (S.D.N.Y. 1994), *aff'd*, 189 F.3d 88 (2d Cir. 1999); *see also* 50 U.S.C. §§ 1801(e), 1803.

FISA required that each application for an order approving electronic surveillance be made by a federal officer upon oath or affirmation after approval by the Attorney General. 50 U.S.C. § 1804(a). An application was required to set forth the identity of the federal officer making the application; the identity, if known, of the target of the electronic surveillance; the facts upon which the applicant relied in concluding that the target of the electronic surveillance was a foreign power or an agent of a foreign power and that each of the facilities or places at which the surveillance was directed was being

---

[2] Prior to October 26, 2001, the date on which the Patriot Act became effective, FISA required that obtaining foreign intelligence information be "the purpose" of electronic surveillance, rather than "a significant purpose." *See United States v. Sattar*, No. 02 Cr. 395, 2003 WL 22137012, at *3 & n.3 (S.D.N.Y. Sept. 15, 2003).

used, or was about to be used, by a foreign power or agent thereof; a statement of proposed minimization procedures; the type of information sought and the means by which surveillance would be effected; a statement concerning the previous applications sought; and a statement of the period of time for which the surveillance was required to be maintained. 50 U.S.C. § 1804(a)(1)-(9).

The application had to be approved by the Attorney General upon the Attorney General's finding that it satisfied the criteria and requirements of such an application. 50 U.S.C. § 1804(a). The application had to include a certification from a high ranking executive officer employed in the area of national security or defense that the information sought was foreign intelligence information as defined by 50 U.S.C. § 1801(e). 50 U.S.C. § 1804(a)(6). Foreign intelligence information included information relating to the ability of the United States to protect against international terrorism, and "information with respect to a foreign power or foreign territory that relates to . . . the conduct of the foreign affairs of the United States," among other things. 50 U.S.C. § 1801(e). FISA required that the certification include a statement that the information sought could not reasonably be obtained by normal investigative techniques and designating the type of foreign intelligence information sought in accordance with § 1801(e). 50 U.S.C. § 1804(a)(6). Finally, after the passage of the Patriot Act, the executive officer was required to certify that "a significant purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. § 1804(a)(6).

Prior to approving the requested electronic surveillance, a FISC judge had to find that: (1) the application was made by a federal officer and approved by the Attorney General; (2) there was probable cause on the basis of the application to believe that the target of the electronic surveillance was a foreign power or agent of a foreign power, and that each of the facilities or places at which the electronic surveillance was directed was being used, or was about to be used, by a foreign power or an agent of a foreign power; (3) the proposed minimization procedures met the definition of minimization procedures set forth in § 1801(h); and (4) the application contained all statements and certifications required under § 1804. 50 U.S.C. § 1805(a).

Pursuant to FISA, a FISC judge who was satisfied that an application met the statutory requirements was required to enter an ex parte order approving the requested electronic surveillance. 50 U.S.C. § 1805(a). Such an order was required to specify the identity of the target of the surveillance; the location of each of the facilities or places at which the surveillance would be directed; the type of information sought and communications or activities to be subjected to the surveillance; the means by which the surveillance would be effected; and the period of time for which the surveillance was approved; and to direct that the minimization procedures be followed. 50 U.S.C. § 1805(c).

The FISA framework governed applications for orders authorizing electronic surveillance to obtain foreign intelligence information, including surveillance of communications between persons located within the United States ("domestic communications") and surveillance of communications between persons located within the

United States and persons located outside the United States ("international communications"). FISA defined "electronic surveillance" to include:

> (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
>
> (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of Title 18;
>
> (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or
>
> (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expecta-

> tion of privacy and a warrant would be required for law enforcement purposes.

50 U.S.C. § 1801(f). The FISA requirements thus applied to the surveillance of international wire communications (including telephone and email communications) provided that the surveillance occurred in the United States. 50 U.S.C. § 1801(f)(2). The FISA requirements did not apply to the surveillance of international radio communications, or to surveillance of international wire communications that did not take place in the United States,[3] unless such surveillance targeted a known United States person located in the United States. *See* 50 U.S.C. §§ 1801(f)(1-2).[4]

B

The FAA was signed into law on July 10, 2008. The FAA leaves much of the preexisting FISA framework intact. However, new Section 702 of FISA, added by Section 101(a)(2) of the FAA and codified at 50 U.S.C. § 1881a, sets forth a new framework displacing the preexisting FISA framework where the Government seeks approval from the FISC to authorize surveillance targeting non-United States persons located outside the United States to acquire foreign intelligence information. Under the FAA, "[n]otwithstanding any other provision of law, upon the issuance of an order in accord-

---

[3] The plaintiffs represent that at the time FISA was passed, approximately half of Americans' international communications were transmitted by radio or satellite, the monitoring of which Congress did not regulate. The Government represents that the percentage was greater than half.

[4] FISA defines "United States person" to mean a citizen of the United States or an alien lawfully admitted for permanent residence, in relevant part. 50 U.S.C. § 1801(i).

ance with [50 U.S.C. § 1881a(i)(3)] or a determination under [50 U.S.C. § 1881a(c)(2)], the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. § 1881a(a).

In order to authorize surveillance under the FAA, the Attorney General and the Director of National Intelligence must apply for and obtain an order authorizing such surveillance from the FISC. 50 U.S.C. §§ 1881a(a) & (i)(3).[5] The application consists of providing a written certification and any supporting affidavit, under oath and under seal, to the FISC. The certification must attest, among other things, that a significant purpose of the requested surveillance is to obtain foreign intelligence information; that the surveillance involves obtaining such information from or with the assistance of an electronic communications service provider; and that the

---

[5] The FAA provides an exception where the Attorney General and the Director of National Intelligence determine that exigent circumstances exist because, without immediate implementation of an authorization of surveillance, intelligence important to the national security of the United States may be lost or not timely acquired and time does not permit the issuance of an order pursuant to 50 U.S.C. § 1881a(i)(3) prior to the implementation of such authorization. 50 U.S.C. § 1881a(c)(2). In the case of a determination of exigent circumstances pursuant to 50 U.S.C. § 1881a(c)(2), the Attorney General and the Director of National Intelligence must undertake as soon as practicable, but in no event later than 7 days after such determination is made, to fulfill the same requirements ordinarily imposed before an order authorizing surveillance under the FAA may be obtained from the FISC. 50 U.S.C. § 1881a(g)(1)(B).

surveillance complies with certain limitations set forth in § 1881a(b). 50 U.S.C. § 1881a(g)(2)(A)(v-vii).

Pursuant to the limitations set forth in § 1881a(b), the requested surveillance may not intentionally target any person known at the time of the surveillance to be located in the United States; any person reasonably believed to be located outside the United States if the purpose of such surveillance is to target a particular, known person reasonably believed to be in the United States; or any United States person reasonably believed to be located outside the United States. 50 U.S.C. § 1881a(b)(1-3). Moreover, the requested surveillance may not intentionally acquire communications known at the time of the surveillance to be domestic communications, 50 U.S.C. § 1881a(b)(4), although it may intentionally acquire international communications.[6] Section 1881a(b) also provides that the requested surveillance must be conducted in a manner consistent with the Fourth Amendment. 50 U.S.C. § 1881a(b)(5).

The certification must attest that guidelines have been adopted in accordance with 50 U.S.C. § 1881a(f) to ensure compliance with the limitations in § 1881a(b) and to ensure that an application for a court order is filed as required by § 1881a. 50 U.S.C. § 1881a(g)(2)(A)(iii). In addition, such guidelines must be provided to the congressional intelligence committee and the Committees on the Judiciary of the Senate and the House of Representatives, as well as the FISC. 50 U.S.C. § 1881a(f)(2). The certification must attest that such guidelines are

---

[6] Insofar as the FAA regulates the surveillance of international radio communications to obtain foreign intelligence information, it establishes regulations where none existed under FISA.

consistent with the Fourth Amendment. 50 U.S.C. § 1881a(g)(2)(A)(iv).

The certification must attest that the Government has targeting and minimization procedures in place that have been approved by the FISC or have been submitted to the FISC for approval or will be submitted with the certification. 50 U.S.C. § 1881a(g)(2)(A)(i-ii). The certification must also include the actual procedures and attest that they comply with the Fourth Amendment. 50 U.S.C. § 1881a(g)(2)(B) & (g)(2)(A)(iv). "Targeting procedures" are procedures reasonably designed to ensure that the requested surveillance is limited to targeting persons reasonably believed to be located outside the United States, and to prevent the intentional surveillance of communications known to be domestic communications at the time of the surveillance. 50 U.S.C. § 1881a(d)(1) & (g)(2)(A)(i). "Minimization procedures" for purposes of electronic surveillance under the FAA must meet the definition of minimization procedures for purposes of electronic surveillance under FISA. Minimization procedures are:

> (1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;
>
> (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in [50 U.S.C. § 1801(e)(1)], shall

> not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; [and]
>
> (3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes[.]

50 U.S.C. § 1801(h).[7]

The certification required by the FAA must be supported, as appropriate, by the affidavit of any appropriate official in the area of national security who is appointed by the President, by and with the advice and consent of the Senate, or who is the head of an element of the intelligence community. 50 U.S.C. § 1881a(g)(2)(C). The certification must include an effective date for the authorization that is at least 30 days after the submission of the certification to the FISC; or, if the acquisition has begun or the effective date is less than 30 days after the submission of the certification to

---

[7] Section 1801(h) includes a fourth requirement for minimization procedures where surveillance is conducted pursuant to 50 U.S.C. § 1802(a). Surveillance conducted under § 1802(a) is solely directed at communications transmitted by means of communications used exclusively between or among foreign powers, among other things, and may be authorized without a court order if the requirements of that section are satisfied. 50 U.S.C. § 1802(a). Surveillance conducted pursuant to the FAA is not subject to the minimization requirement set forth in § 1801(h) that applies only to surveillance conducted pursuant to § 1802(a).

the FISC, the date the acquisition began or the effective date of the acquisition. 50 U.S.C. § 1881a(g)(2)(D).

The FISC has jurisdiction to review a certification for electronic surveillance under the FAA, including the targeting and minimization procedures that were adopted by the Attorney General in consultation with the Director of National Intelligence. 50 U.S.C. § 1881a(i)(1)(A). The FAA provides that the FISC shall review the certification, the targeting procedures and the minimization procedures to ensure that they comply with all of the requirements discussed above. 50 U.S.C. § 1881a(i)(2). If the FISC finds that the certification contains all the required elements and the targeting and minimization procedures are in compliance with the statute and with the Fourth Amendment, it must issue an order granting the Government approval to authorize the requested surveillance. 50 U.S.C. § 1881a(i)(3)(A). The FISC must complete its review and issue an order with respect to an application for an order authorizing surveillance no more than 30 days after the date on which the certification and the targeting and minimization procedures are submitted for approval. 50 U.S.C. § 1881a(i)(1)(B).

The FAA allows for the Government to appeal an order rejecting an application for a surveillance order to the FISA Court of Review. The Court of Review must decide an appeal no more than 60 days from the date the appeal is filed. The Government is permitted to continue any surveillance affected by a FISC order while an appeal to the Court of Review is pending, or while any rehearing of the FISC order by the FISC en banc is pending. The Government may file a petition for a writ

of certiorari with the Supreme Court for review of a decision of the Court of Review. 50 U.S.C. § 1881a(i)(4).

The FAA provides for a semiannual assessment of compliance with the targeting and minimization procedures adopted in accordance with 50 U.S.C. §§ 1881a(d) and (e) and the guidelines adopted in accordance with § 1881a(f). The FAA provides that each assessment shall be made by the Attorney General and the Director of National Intelligence, and submitted to the FISC, the congressional intelligence committees, and the Committees on the Judiciary of the House of Representatives and the Senate.[8] 50 U.S.C. § 1881a(*l*).

The FAA also provides that the Inspector General of the Department of Justice and the Inspector General of each element of the intelligence community authorized to acquire foreign intelligence information under § 1881a are authorized to review compliance with the targeting and minimization procedures adopted under §§ 1881a(d) and (e) and the guidelines adopted under § 1881a(f). With respect to surveillance authorized under § 1881a, those officials are required to review the number of disseminated intelligence reports containing a reference to a United States person identity and the number of United States person identities subsequently disseminated by the element concerned in response to requests for identities that were not referred to by name or title in the original reporting. They are also required to review the number of targets that were later determined

---

[8] The submission of semiannual assessments to the congressional committees, under this provision and all other provisions in the FAA, is subject to the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution. 50 U.S.C. § 1881a(*l*)(B).

to be located in the United States and, to the extent possible, whether communications of such targets were reviewed. They must provide each such review to the Attorney General, the Director of National Intelligence, the congressional intelligence committees, and the Committees on the Judiciary of the House of Representatives and the Senate. 50 U.S.C. § 1881a(*l*)(2).

Finally, the FAA provides for the head of each element of the intelligence community conducting surveillance authorized under § 1881a to conduct an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the surveillance. The annual review is required to provide an accounting of the number of disseminated intelligence reports containing a reference to a United States person identity; an accounting of the number of United States person identities subsequently disseminated by that element in response to requests for identities that were not referred to by name or title in the original reporting; the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed; and a description of any procedures developed by the head of such element of the intelligence community and approved by the Director of National Intelligence to assess, in a manner consistent with national security, operational requirements and the privacy interests of United States persons, the extent to which the surveillance authorized under § 1881a acquires the communications of United States persons, and the results of any such assessment. 50 U.S.C. § 1881a(*l*)(3)(A). The purpose of the annual review is to evaluate the adequacy of the minimization procedures used and, as appropriate, the application of the minimi-

zation procedures to a particular surveillance. 50 U.S.C. § 1881a(*l*)(3)(B). The annual reviews are to be provided to the FISC, the Attorney General, the Director of National Intelligence, the congressional intelligence committees, and the Committees on the Judiciary of the House of Representatives and the Senate. 50 U.S.C. § 1881a(*l*)(3)(C).[9]

In applying for an order from the FISC approving the authorization of surveillance under the FAA, the Government is not required to identify the specific facilities, places, premises, or property at which the surveillance will be directed or conducted. 50 U.S.C. § 1881g(4). The Government is also not required to identify the specific targets of the requested surveillance or to show probable cause that the prospective targets of the surveillance are foreign powers or agents thereof.

II

The plaintiffs move for summary judgment declaring the FAA unconstitutional, and the Government moves for summary judgment dismissing the plaintiffs' constitutional challenge. Summary judgment may not be granted unless "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477

---

[9] The FAA also provides a framework for directives to be issued by the Attorney General and the Director of National Intelligence to electronic communication service providers in order to carry out surveillance authorized under § 1881a, and for judicial review of such directives. *See* 50 U.S.C. § 1881a(h).

U.S. 317, 322 (1986); *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008); *New York State Motor Truck Ass'n v. Pataki*, No. 03 Civ. 2386, 2004 WL 2937803, at *3 (S.D.N.Y. Dec. 17, 2004).

Although both parties have moved for summary judgment, the only factual submissions in the record are those made by the plaintiffs. In opposing the plaintiffs' motion for summary judgment, and in responding to the plaintiffs' Statement of Undisputed Facts pursuant to Local Rule 56.1 (the plaintiffs' "56.1 Statement" or "56.1 Stmt."), the Government makes no reference to any evidence except that submitted by the plaintiffs. Moreover, the Government submits no facts in support of its own motion for summary judgment. At oral argument, the Government clarified that it was accepting the factual submissions of the plaintiffs as true for purposes of these motions. (Tr. 48-49.) Of course, that does not imply the acceptance of any legal conclusions embedded in the plaintiffs' 56.1 statement. *See, e.g., Alliance Sec. Products, Inc. v. Fleming Co.*, 471 F. Supp. 2d 452, 454 & n.8 (S.D.N.Y. 2007) (legal arguments in Rule 56.1 Statement disregarded in determining whether there are genuine issues of material fact).[10]

---

[10] The plaintiffs argue in passing that the defendants should not be entitled to summary judgment because they failed to submit a 56.1 Statement in support of their motion for summary judgment. However, the Court can dispense with the requirement of a 56.1 Statement, *see Hadden v. Bureau of Prisons*, No. 07 Civ. 8586, 2008 WL 5429823, at *5 (Dec. 22, 2008) (citing *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 109 n.2 (2d Cir. 2006)), and it would make no sense to require such a statement from the defendants in this case because they are prepared to accept the plaintiffs' allegedly undisputed facts, the conditional acceptance of which is in any event the consequence of failing to submit a 56.1

Accordingly, the following facts are undisputed.[11] The plaintiffs are attorneys and human rights, labor, legal, and media organizations whose work requires them to engage in sensitive and sometimes privileged telephone and email communications with colleagues, clients, journalistic sources, witnesses, experts, foreign governmental officials, and victims of human rights abuses located outside the United States. (Pl.'s 56.1 Stmt. ¶ 9(A).) Some of the plaintiffs communicate by telephone and email with people the United States Government believes or believed to be associated with terrorist organizations. (Pl.'s 56.1 Stmt. ¶ 9(B).) Some of the plaintiffs communicate by telephone and email with political and human rights activists who oppose governments that are supported economically or militarily by the United States Government. (Pl.'s 56.1 Stmt. ¶ 9(C).) Some of the plaintiffs communicate by telephone and email with people located in geographic areas that are a special focus of the United States Government's counterterrorism or diplomatic efforts. (Pl.'s 56.1 Stmt. ¶ 9(D).)

Statement. *Cf. Cosy Goose Hellas v. Cosy Goose U.S.A. Lt.*, 581 F. Supp. 2d 606, 616-17.

Moreover, when the plaintiffs' standing has been challenged on a motion for summary judgment the plaintiffs must come forward with sufficient evidence to show that there is a genuine material issue as to their standing to warrant a trial. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 53-54 (1976). If the plaintiffs fail to meet this standard, then summary judgment should be granted dismissing their complaint.

[11] The Court only recites those facts set forth by the plaintiffs that are material to the disposition of these motions. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

All of the plaintiffs exchange information that constitutes foreign intelligence information within the meaning of the FAA. (Pl.'s 56.1 Stmt. ¶ 9(E).) The plaintiffs believe that their communications will be monitored under the FAA, and that those communications will be retained, analyzed, and disseminated by the Government. (Pl.'s 56.1 Stmt. ¶ 9(F).) This belief has affected the way the plaintiffs do their jobs. (Pl.'s 56.1 Stmt. ¶ 9(G).) Namely, the plaintiffs feel constrained in locating witnesses, cultivating sources, gathering information, and communicating confidential information to their clients, among other things. (Pl.'s 56.1 Stmt. ¶ 9(H).) The plaintiffs have ceased engaging in certain conversations on the telephone and by email. (Pl.'s 56.1 Stmt. ¶ 9(I).) The attorney plaintiffs have an ethical obligation to avoid communicating confidential information about client matters over telephone, fax, or email if they have reason to believe that it is likely to be intercepted by others. (Pl.'s Supplemental 56.1 Stmt. ¶ 2(J).)

The plaintiffs have incurred costs in seeking to protect the confidentiality of sensitive and privileged communications. (Pl.'s 56.1 Stmt. ¶ 9(J).) Some of the plaintiffs now travel long distances to meet personally with individuals instead of communicating with those individuals over telephone or email. (Pl.'s 56.1 Stmt. ¶ 9(K).) On the whole, the plaintiffs' reaction to the FAA has affected their work more than their reaction to previous regulatory enactments providing frameworks for Government surveillance. (Pl.'s 56.1 Stmt. ¶ 9(L).)

III

The plaintiffs argue that on its face, the FAA violates the Fourth Amendment, the First Amendment, and Ar-

ticle III of the Constitution. The plaintiffs argue under the Fourth Amendment that the FAA fails to protect the privacy interest of Americans in the content of their telephone calls and emails. They argue under the First Amendment that the FAA chills the constitutionally protected speech of Americans who fear that their telephone calls and emails will be subject to surveillance. They argue under Article III that the process of judicial review set forth in the FAA violates the principle of the separation of powers by allowing the FISC to issue orders approving the authorization of surveillance in the absence of any case or controversy and by allowing for the Government to continue surveillance while an appeal to the FISC Court of Review is pending.

In order to reach the merits of the plaintiffs' constitutional arguments, the Court must first determine whether the plaintiffs have standing to bring this action. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."); *Ontario Public Service Employees Union Pension Trust Fund v. Nortel Networks Corp.*, 369 F.3d 27, 34 (2d Cir. 2004) ("In order for our court to properly reach the merits of the case . . . we must first find that the parties involved have met the basic requirements of standing."); *Local 851 of International Brotherhood of Teamsters v. Thyssen Hill Logistics, Inc.*, Nos. 95 Civ. 5179, 02 Civ. 6250, 2004 WL 2269703, at *5 (E.D.N.Y. Sept. 30, 2004) ("Standing is a jurisdictional prerequisite; accordingly, the Court must initially determine whether [the plaintiff] has standing to invoke the jurisdiction of the federal courts to determine the merits of the underlying disputes.") (internal citation and quotation marks omitted).

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). To satisfy the irreducible constitutional minimum of Article III standing, a plaintiff must show that (1) it has suffered an actual or imminent injury in fact, that is concrete and particularized, and not conjectural or hypothetical; (2) there is a causal connection between the injury and the defendant's actions; and (3) it is likely that a favorable decision in the case will redress the injury. *Id.* at 560-61. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561.

Because the judicial power of federal courts "exists only to redress or otherwise protect against injury to the complaining party," a federal court's jurisdiction "can be invoked only when the plaintiff . . . has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . .'" *Warth*, 422 U.S. at 499 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)). The plaintiff must show a particularized injury that affects the plaintiff in a personalized and individual way. *Lujan*, 504 U.S. at 560 n.1. Only a plaintiff so injured has "'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth*, 422 U.S. at 498-99 (quoting *Baker v. Carr*, 399 U.S. 186, 204 (1962)).

Apart from the irreducible constitutional minimum, the Supreme Court has also recognized other prudential limitations on the class of persons who may invoke the federal judicial power. "[T]he Court has held that when

the asserted grievance is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth*, 422 U.S. at 499. The Court has also held that the plaintiff must generally assert the plaintiff's own rights, and cannot rest on the legal rights or interests of third parties. *Id*. This case turns on whether the plaintiffs have met the irreducible constitutional minimum of personal, particularized, concrete injury in fact without turning to the additional prudential aspects of standing.

The plaintiffs advance what they characterize as two independent bases for Article III standing to challenge the constitutionality of the FAA. First, the plaintiffs argue that they have standing on the basis of their fear that their communications will be monitored under the FAA because that fear is "actual and well-founded." Second, the plaintiffs argue that they have standing on the basis of the costs they have incurred in taking measures to protect the confidentiality of their international communications, in light of their fear of surveillance. The Court addresses each proffered basis for standing in turn.

A

The plaintiffs argue that their fear of surveillance under the FAA provides a basis for Article III standing to challenge the constitutionality of that statute. They seize upon case law indicating that in the context of a pre-enforcement challenge to a statute on First Amendment grounds, a plaintiff need only demonstrate "'an actual and well-founded fear that the law will be enforced against' it" to satisfy the injury-in-fact require-

ment for Article III standing. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)); *see also Am. Booksellers Foundation v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003).[12] The plaintiffs

[12] The Court of Appeals for the Second Circuit has indicated that the standard of showing an "actual and well-founded fear" of enforcement is "slightly" easier to satisfy than the standard of showing a "realistic danger" of enforcement that applies to non-First Amendment pre-enforcement challenges to a statute. *Am. Booksellers*, 342 F.3d at 101 (internal quotation marks omitted). The plaintiffs argue that the "actual and well-founded fear" standard should apply to the determination of standing with respect to all of their claims, rather than the First Amendment claim alone, because the alleged conduct that is the source of the injuries asserted under each constitutional claim—the potential enforcement of the statute—implicates First Amendment rights. The difference between the "actual and well-founded fear" standard and the "realistic danger" standard has never been explained, and it should be noted that there are some indications that there is no meaningful difference between the two standards. *See Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 227 (2d Cir. 2006) (finding standing for as-applied First Amendment challenge based on "actual and well-founded fear" and "realistic danger"); *cf. Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (invoking "realistic danger" standard in First Amendment context). In any event, any difference between the "actual and well-founded fear" standard and the "realistic danger" standard has no bearing on the outcome of this case, and the parties agree that Article III standing should be assessed under a single standard with respect to all of the plaintiffs' claims. (Tr. 12, 54.) Therefore, the Court applies the "actual and well-founded fear" standard to all of the challenges to the FAA.

In addition, because the potential enforcement of the challenged statute accounts for all of the injuries asserted under each constitutional claim; the parties agree that Article III standing should be assessed under a single standard with respect to all of the plaintiffs' claims; and separate standing analyses for each constitutional claim would not affect the outcome of this case, the Court does not undertake a separate standing analysis with respect to each alleged constitutional

urge that their fear of surveillance is "actual and well-founded" because, according to the plaintiffs, "the FAA *authorizes* the government to monitor plaintiffs' international communications" and "plaintiffs' communications are *likely* to be collected under the challenged law" based on the nature of the communications and the identity of the persons with whom the plaintiffs communicate. (Pl.'s Reply Br. 4.) (emphasis in original).

The Government argues that the plaintiffs' fear that their communications will be monitored under the FAA does not confer standing on the plaintiffs to challenge the constitutionality of that statute. The Government contends that standing to make a pre-enforcement challenge to a statute may only be found "where there is a threat of imminent enforcement of a specific proscription that demonstrably applies to a plaintiff's actions" (Gov't Reply Br. 2-3), and that no such basis for a pre-enforcement challenge to the FAA exists here.

The plaintiffs have failed to establish standing to challenge the constitutionality of the FAA on the basis of their fear of surveillance. The plaintiffs can only demonstrate an abstract fear that their communications will be monitored under the FAA. The FAA creates a framework within which intervening federal officials

---

violation. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78 (1978) (holding that plaintiffs need not "demonstrate a connection between the injuries they claim and the constitutional rights being asserted"); *United Presbyterian Church in the United States of America v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) (Scalia, J.) (conducting collective standing analysis for First, Fourth, and Fifth Amendment claims and separation of powers claims); *cf. Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000) (standing must be demonstrated separately for injunctive relief and civil penalties because these are different forms of relief).

may apply for approval from the FISC to authorize surveillance targeting non-United States persons located outside the United States to acquire foreign intelligence information. The FAA sets forth the requirements that an application to obtain a surveillance order from the FISC must satisfy. Contrary to the characterization of the statute in the plaintiffs' motion papers, the FAA itself does not authorize the surveillance of the plaintiffs' communications. Indeed, the FAA neither authorizes surveillance nor identifies on its face a class of persons that includes the plaintiffs. Rather the FAA authorizes specified federal officials to seek a surveillance order from the FISC. That order cannot target the plaintiffs and whether an order will be sought that affects the plaintiffs' rights, and whether such an order would be granted by the FISC, is completely speculative.

1.

Courts have explicitly rejected standing based on a fear of surveillance in circumstances similar to those in this case. In *United Presbyterian Church in the United States of America v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) (Scalia, J.), the Court of Appeals for the District of Columbia Circuit denied standing to plaintiffs seeking to challenge the constitutionality of Executive Order No. 12333 (the "Executive Order"). The Executive Order created a framework within which intelligence agencies could apply to the Attorney General for approval to collect, retain or disseminate certain kinds of intelligence information. *See* Executive Order No. 12333 at ¶¶ 2.3, 2.5. The Executive Order set forth the kinds of information that could be collected and established limitations on permissible collection techniques, including electronic surveillance under certain circumstances.

Executive Order No. 12333 at ¶¶ 2.3, 2.4, 2.5. The plaintiffs were political and religious organizations that the Court assumed were more likely than the public at large to be subject to surveillance under the Executive Order. *See United Presbyterian*, 738 F.2d at 1380. The Court rejected the plaintiffs' attempt to rely upon the "threat" of surveillance for standing to challenge the Executive Order, explaining that "[t]he problem with [the plaintiffs'] attempt to rely upon this sort of harm to establish standing in the present case is that they have not adequately averred that any specific action is threatened or even contemplated against them." *Id.* The Court observed that "[t]o give these plaintiffs standing on the basis of threatened injury would be to acknowledge, for example, that all churches would have standing to challenge a statute which provides that search warrants may be sought for church property if there is reason to believe that felons have taken refuge there. That is not the law." *Id.*

The plaintiffs' attempt to rely upon their fear of surveillance as a basis for standing in this case is not materially distinguishable from the attempt that was rejected in *United Presbyterian.* As in *United Presbyterian*, the plaintiffs in this case have not shown that any specific action is threatened or even contemplated against them. They have not shown or alleged that the Government has sought or obtained approval from the FISC to authorize surveillance of their communications. They have not shown or alleged that surveillance of their communications has ever taken place under the challenged statute. They only allege a fear, based on a perceived likelihood, that their communications will be surveilled. But absent any showing that such surveillance has been con-

ducted, authorized or even contemplated, the plaintiffs' fear is speculative.

Moreover, the alleged injury in this case is even more speculative than the injury asserted in *United Presbyterian* because the FAA requires a court to approve the application for surveillance, which includes making an independent judgment with respect to whether the guidelines proposed by the Executive Branch to circumscribe the requested surveillance comply with the Fourth Amendment. The intervening role carved out for the Judicial Branch in the FAA makes the plaintiffs' assertion of standing on the basis of their fear of surveillance uniquely attenuated.

Arguments for standing similar to those asserted by the plaintiffs here were also rejected by the Court of Appeals for the Sixth Circuit in *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007). *ACLU* involved a challenge to the constitutionality of the Terrorist Surveillance Program (the "TSP") conducted by the National Security Agency (the "NSA"). The TSP entailed the warrantless interception of telephone and email communications with respect to which one party was located outside the United States and the NSA had a reasonable basis to conclude that one party was connected to al Qaeda. *See ACLU*, 493 F.3d at 648. The plaintiffs were journalists, academics and lawyers who regularly communicated with individuals located overseas whom they believed the NSA suspected of being connected to al Qaeda and whom they believed the NSA would therefore be likely to monitor under the TSP. *Id.* at 648-49. The *ACLU* decision was fragmented into three opinions: a lead opinion, a concurrence, and a dissent. Both the lead opinion and the concurring opinion rejected the plaintiffs' alle-

gation that they had standing on the basis of their fear of surveillance pursuant to the TSP.[13]

The lead opinion rejected this basis for standing on the rationale that "it would be unprecedented for this court to find standing for plaintiffs to litigate a Fourth Amendment cause of action without any evidence that the plaintiffs themselves have been subjected to an illegal search or seizure." *Id.* at 673-74 (Batchelder, J.). The concurring opinion rejected standing on the grounds that the plaintiffs had not shown that they were "personally subject to" the warrantless surveillance policy. *Id.* at 691 (Gibbons, J., concurring). The concurring opinion drew an implicit distinction between proof of being subject to the surveillance policy and proof of having been subjected to actual surveillance pursuant to that policy. The former consisted of "evidence as to whether, in the government's view, there are reasonable grounds to believe that a party to the [plaintiffs'] communications is affiliated with al Qaeda." *Id.* at 690 (Gibbons, J., concurring) (internal quotation marks omitted). It was the failure to present such evidence that was fatal to the plaintiffs' assertion of standing. Relying on *United Presbyterian*, the concurring opinion distinguished cases involving "[a] genuine threat of enforcement of a policy against a plaintiff who is demonstrably subject to that policy," which supports standing, from cases "in which a plaintiff cannot establish that he is subject to the policy but merely fears that he is subject to the policy that may be enforced, which cannot support

---

[13] The lead opinion only discussed this basis for standing in the context of determining whether the plaintiffs had standing to bring Fourth Amendment claims in connection with the TSP. However, the lead opinion denied the plaintiffs standing to bring any of their claims.

standing." *Id.* at 689 n.2 (Gibbons, J., concurring). The plaintiffs could not demonstrate a genuine threat of surveillance because they could not show that they were subject to the challenged surveillance policy—that they would be targeted by the policy. *See id.* at 691 (Gibbons, J., concurring) ("There is no relevant factual difference between the *United Presbyterian Church* plaintiffs, whose activities the D.C. Circuit conceded made them more likely to be subject to surveillance, and the attorney-plaintiffs in this case, whose representation of exactly the types of clients targeted by the TSP makes them more likely to be targeted by the TSP." *Id.* at 691 (Gibbons, J., concurring) (internal citations omitted).

The plaintiffs in this case, like the plaintiffs in *ACLU* and *United Presbyterian*, have not made any showing that they are subject to the surveillance policy they seek to challenge. Without showing that they are subject to the statute they seek to challenge, the plaintiffs' fear that they will suffer harm from that statute is speculative and hypothetical.

Indeed, the plaintiffs in this case are one step further removed from the challenged surveillance policy than were the plaintiffs in *ACLU*. The plaintiffs in *ACLU* sought to challenge an actual program of surveillance that had already been authorized by the President. *See ACLU*, 493 F.3d at 648 n.1. The TSP was more than a framework within which federal officials could apply for authorization to engage in surveillance. The NSA was already authorized to monitor communications with respect to which one party was located outside the United States and there was a reasonable basis to believe that one party was connected to al Qaeda. As the concurring opinion in *ACLU* explained, the plaintiffs in that case

could not show that they were subject to that authorization of surveillance because they could not show that their communications fell into the class of communications that the NSA was authorized to monitor. By contrast, the FAA does not authorize surveillance but rather authorizes the FISC to do so pursuant to the procedures set forth in the statute. Thus the standing argument by the plaintiffs in this case is more speculative and hypothetical than the standing argument rejected by the Court of Appeals for the Sixth Circuit in *ACLU*. No case from within or outside the context of surveillance provides any basis to conclude that the speculative fear of harm asserted by the plaintiffs is sufficient to support standing for a pre-enforcement challenge to a statute.

2.

At oral argument the plaintiffs sought to minimize the persuasiveness of *United Presbyterian* and *ACLU*, which denied standing to plaintiffs who feared the surveillance of their communications, by pointing to "physical surveillance cases" where the Supreme Court reached the merits of challenges to laws or policies authorizing drug or alcohol testing for specific classes of persons, without requiring that the plaintiffs had actually submitted to such testing before bringing such challenges. (Tr. 9 ("The cases I'm thinking of are cases like *Earls* and *Chandler* and *Skinner*.").) None of those physical search cases identified by the plaintiffs undermines the reasoning of the electronic surveillance cases or otherwise provides any support for the plaintiffs' standing argument. The physical search cases concerned plaintiffs who were in a defined class of persons subject to a challenged policy of drug or alcohol testing

and who faced a genuine threat of being tested pursuant to that policy. In *Board of Education of Independent School District Number 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 826 & n.1 (2002), the Supreme Court found that a student plaintiff who participated in competitive extracurricular activities at school had standing to challenge a Board of Education policy requiring all students participating in such activities to consent to drug testing. It was indisputable in *Earls* that the challenged policy required a student who participated in such extracurricular activities, such as the plaintiff, to take a drug test before participating in the activity, and to submit to random drug testing while participating in the activity at any time based on reasonable suspicion. *Earls*, 536 U.S. at 826. *Earls* therefore has no application to this case, where the plaintiffs are not required to do anything or to submit to anything, and where there is no showing that the Government has authorized any action against the plaintiffs. *See also Chandler v. Miller*, 520 U.S. 305, 308-09 (1997) (ruling on merits, without discussing standing, where plaintiff candidates for state offices challenged state law requiring candidates for such offices to certify that they had taken a urinalysis drug test within 30 days prior to qualifying for nomination and that the test results were negative).

Among the drug or alcohol testing cases, the plaintiffs place particular emphasis on *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 611 (1989), in which the Supreme Court upheld on the merits regulations authorizing railroads to conduct drug and alcohol testing of railroad employees after certain accidents, in the event of certain rule violations, or where a supervisor had a reasonable suspicion based on personal obser-

vation that an employee was under the influence of alcohol. *Skinner* provides little guidance for the standing analysis in this case because standing was not contested in that case. It was not discussed by the Supreme Court, the issue was not briefed before the Court, and the appellate court decision contained no discussion of standing. *See Ry. Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988).

To the extent that the Supreme Court implicitly determined that there was standing in *Skinner* as a necessary prerequisite to jurisdiction, nothing about that determination affects the standing analysis in this case. The regulations at issue in *Skinner* authorized drug or alcohol testing of a defined class of persons represented by the plaintiff labor organizations, namely railroad employees. The plaintiffs were plainly subject to the challenged policy. By contrast, the FAA neither authorizes surveillance nor identifies, on its face, a class of persons to which the plaintiffs belong, and there is no allegation or evidence of an order authorizing Government surveillance that would encompass the plaintiffs' communications. Thus the relation in which the railroad employees stood to the challenged policy in *Skinner* is wholly unlike the relation in which the plaintiffs in this case stand to the FAA.

3.

Thus the electronic surveillance cases undermine any claim of standing in this case, and the drug or alcohol testing cases on which the plaintiffs rely do not support the plaintiffs' claims of standing to challenge the FAA based on their fear of surveillance. However, the plaintiffs urge the Court to look beyond surveillance cases. (*See* Tr. 11 ("Surveillance is just like any other context.

. . . [I]t's a completely artificial distinction between surveillance cases [and] other contexts.").) The plaintiffs claim that their position is supported by cases outside the surveillance context considering the issue of standing to make a pre-enforcement challenge to a statute or regulation. They argue that under those cases they have shown an "actual and well-founded fear of enforcement" of the FAA against them that is sufficient for standing in this case.

The plaintiffs' reliance on non-surveillance cases considering pre-enforcement challenges to statutes or regulations is unavailing. The standing analysis displayed in those cases is fully consistent with the rejection of standing in the electronic surveillance cases. Indeed, the application of the reasoning employed by the non-surveillance cases to this case reinforces the plaintiffs' lack of standing to challenge the FAA. The non- surveillance cases cited by the plaintiffs stand for the proposition that a plaintiff may challenge a specific law or regulation before it is enforced against the plaintiff if the plaintiff is subject to that law or regulation and has a well-founded fear that it will be so enforced. The plaintiffs in this case have made no showing that they are subject to any specific law or regulation that they seek to challenge. The FAA does not require that the plaintiffs do anything or refrain from doing anything such that they might have a well-founded fear that the Government would take action against them for failing to abide by the statute. Moreover, the FAA does not authorize surveillance of the plaintiffs' communications and the plaintiffs have made no showing that the Government has sought any such surveillance pursuant to the general framework set forth in the statute or that such surveillance has been authorized. It is unnecessary

to seek to define the outer limits of what it would take for the plaintiffs to be subject to the FAA such that they would have standing to challenge its constitutionality. The plaintiffs' failure to show that they are subject to the FAA in any concrete way is sufficient to conclude that the plaintiffs lack standing to challenge the FAA.

Under the line of non-surveillance cases referred to by the plaintiffs, "[a] plaintiff bringing a pre-enforcement facial challenge against a statute need not demonstrate to a certainty that it will be prosecuted under the statute to show injury, but only that it has an actual and well-founded fear that the law will be enforced against it." *Vt. Right to Life*, 221 F.3d at 382 (internal quotation marks omitted). The plaintiffs seek to couch their fear of surveillance under the FAA as an "actual and well-founded fear" that the FAA will be enforced against them. But the cases are clear that an actual and well-founded fear of enforcement depends upon a reasonable showing that the plaintiff is subject to the challenged law or regulation. In the cases cited by the plaintiffs involving pre-enforcement challenges to non-surveillance statutes, the plaintiffs in those cases were subject to a challenged statute or regulation such that there would be consequences resulting from a failure to comply. Courts reasonably have allowed challenges to such legal proscriptions without requiring the plaintiff to incur the penalties of non-compliance. *Cf. Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 302-03 (1979) (granting standing for pre-enforcement challenge to certain provisions of statute based on "realistic danger" of enforcement where plaintiffs intended to engage in conduct "arguably prohibited by the statute"); *Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008 (finding standing for

pre-enforcement challenge by national bank to state statute limiting certain interest rates where plaintiff "reasonably interpreted [the statute's] limitation as, on its face, applying to [the plaintiff]"; *Vt. Right to Life*, 221 F.3d at 383 (finding standing for pre-enforcement challenge to statute proscribing range of activities relating to campaign finance disclosure and reporting requirements where plaintiff's interpretation of proscription to cover its activities was "reasonable," and plaintiff's activities "could easily be construed" to fall within the statute's proscription); *Nitke v. Gonzales*, 413 F. Supp. 2d 262, 267 (S.D.N.Y. 2005) (per curiam) ("[T]o show that a fear [of enforcement] is well-founded, the plaintiff must show that it is reasonable. A fear that a statute will be enforced against a plaintiff is reasonable if the plaintiff's interpretation of the statute to reach his or her conduct is itself reasonable.") (internal citation and quotation marks omitted).

Every non-surveillance pre-enforcement challenge case cited by the plaintiffs involved a law or regulation that could, at the very least, reasonably be interpreted on its face to apply to the plaintiffs in that case. The plaintiffs in such cases faced the risks of non-compliance unless they received judicial relief from enforcement of the statute or regulation against them. *See, e.g.*, *Am. Booksellers Ass'n*, 484 U.S. at 392 (granting standing for pre-enforcement challenge to statute where "the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution"); *Am. Booksellers Foundation*, 342 F.3d at 100-01 (finding standing for pre-enforcement challenge to state statute proscribing residents from distributing pornographic material harmful

to minors where statute "reach[ed] material posted on plaintiffs' websites"); *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) ("The record reveals that [the plaintiff] intends to engage in political expenditures of a type protected under the First Amendment, and New Hampshire's statutory scheme restricts [the plaintiff's] freedom to make those expenditures.") (internal citation omitted); *see also Pac. Capital Bank*, 542 F.3d at 350; *Vt. Right to Life*, 221 F.3d at 383.

The plaintiffs attempt to stretch the pre-enforcement cases to apply to their challenge to the FAA even though those cases do not arise in the context of electronic surveillance or surveillance of any kind, and even though the facts of those cases bear no resemblance to the standing issues raised in the context of the FAA. A fundamental tenet of standing is that a plaintiff must show that the plaintiff has suffered an actual or imminent injury in fact, that is concrete and particularized, and not conjectural or hypothetical. *Lujan*, 504 U.S. at 559. In each of the pre-enforcement cases, the plaintiff or plaintiffs could point to a specific statute that reasonably could be applied to them and which produced consequences if they failed to comply. That provided concrete and particularized injury.

In this case, the plaintiffs have not made a reasonable showing that they are subject to the challenged statute in any way. The FAA does not require the plaintiffs to do anything or refrain from doing anything, and does not authorize surveillance to which the plaintiffs will be subject. The statute cannot reasonably be interpreted on its face to apply to the plaintiffs, because it neither authorizes surveillance nor refers to a class of

persons that on its face could reasonably be construed to include the plaintiffs. Moreover, there is no allegation or evidence that an order has been obtained pursuant to the statute authorizing the surveillance of communications that could reasonably be construed to include the plaintiffs' communications. Therefore the plaintiffs cannot establish standing on the basis of a well-founded fear of enforcement. The plaintiffs have failed to show that there is anything to enforce, because they have failed to show that they are subject to the statute. The plaintiffs' alleged fears of enforcement arising from the fact that surveillance orders of unknown scope may eventually be issued that may affect them bear no resemblance to the fears of enforcement of specific statutes or regulations that reasonably apply to complaining plaintiffs and that have been found sufficient for purposes of standing.

The Supreme Court's decision in *Babbitt*, relied upon by the plaintiffs, does not suggest otherwise. In *Babbitt*, the plaintiffs, including a farmworkers' union (the "UFW"), challenged, in relevant part, five provisions of a farm labor statute passed in Arizona. *Babbitt*, 442 U.S. at 292-93. The Court emphasized that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 298. The Court held that the plaintiffs had standing to challenge three of the five provisions of the statute but not the remaining two. The first challenged provision regulated the election of employee bargaining representatives, specifying certain procedures for such elections. *Id.* at 292-94, 299. The Court found that the plaintiffs had standing to challenge that provision, because "the UFW has in the past sought to represent Arizona farmworkers and has asserted in its complaint a desire to organize

such workers and to represent them in collective bargaining." *Id.* at 300.

The second challenged provision limited consumer publicity and violations of the statute were criminally punishable. *Id.* at 301-02. The Court found that the plaintiffs had standing to challenge that provision because they intended to engage in consumer publicity and erroneous statements would be inevitable. *Id.* at 302.

The third challenged provision was the criminal penalty provision of the statute, which authorized the imposition of criminal sanctions against any person violating any provision of the statute. *Id.* at 303. The Court found that the plaintiffs had standing to challenge the criminal penalty provision because they intended to engage in conduct that may be proscribed by the statute. *Id.*

Standing for the plaintiffs in *Babbitt* lends no support to the plaintiffs in this case. In *Babbitt* the Supreme Court found that the plaintiffs had standing to challenge provisions of a statute that could be construed on their face to proscribe or regulate conduct in which the plaintiffs wished to engage. The analysis in *Babbitt* cannot be superimposed onto this case. The plaintiffs in this case have not challenged a statute that regulates or proscribes any conduct by them, as was the case in *Babbitt*, or that otherwise applies to them.

To the extent the decision in *Babbitt* bears on the issue of standing in this case, it is instructive for its rejection of the plaintiffs' bid for standing to challenge one of the remaining provisions of the statute. That provision provided that no employer was required to furnish certain information to a labor organization to enable that organization to communicate with employees of the

employer, members of the labor organization, its supporters, or adherents (the "access provision"). *Id.* at 303-04. The UFW argued that it would seek access to employers' property to communicate with farmworkers, which the Court conceded it would do. *Id.* at 304. However, the Court found the challenge to be non-justiciable because the plaintiffs had not yet "assert[ed] an interest in seeking access to particular facilities as well as a palpable basis for believing that access will be refused." *Id.*; *see also id.* ("[I]t is conjectural to anticipate that access will be denied. More importantly, [plaintiffs'] claim depends inextricably upon the attributes of the situs involved.").

The plaintiffs' challenge to the FAA is similarly non-justiciable. The plaintiffs seek to challenge the FAA without any showing that the FISC has approved surveillance that could encompass their communications. Thus the plaintiffs in this case lack a "palpable basis for believing" that their communications will be surveilled. In *Babbitt* it was "impossible to know whether access will be denied to places fitting [plaintiffs'] constitutional claim." *Id.* The plaintiffs' claim depended upon the attributes of the situs to which they sought access, and the plaintiffs had not asserted an interest in gaining access to any particular situs. Like the plaintiffs in *Babbitt* attempting to challenge the access provision, the plaintiffs in this case have only a hypothetical fear of being harmed by the statute that is insufficient to support standing.[14]

---

[14] In *Babbitt* the Supreme Court also denied the plaintiffs standing to challenge a compulsory arbitration provision in the statute. The Court based its holding in part on the fact that the plaintiffs had "never contested the constitutionality of the arbitration clause." *Id.* at 305.

In sum, the plaintiffs' assertion of standing to challenge the FAA on the basis of their fear of surveillance finds no support in the cases that have analyzed standing to challenge electronic surveillance. The plaintiffs' argument also finds no support in the cases relating to drug and alcohol testing or the pre-enforcement challenges to non-surveillance statutes and regulations on which the plaintiffs rely. In none of those contexts do the cases provide any support for the proposition that a plaintiff may challenge a statute to which the plaintiff cannot reasonably be considered subject. On its face the FAA does not regulate or proscribe the plaintiffs' conduct or authorize surveillance of a class of persons that includes the plaintiffs. Moreover, the plaintiffs have neither alleged nor shown that the Government has sought or obtained an order from the FISC authorizing surveillance that could reasonably be construed to encompass their communications. The plaintiffs' alleged fear of surveillance is insufficient to provide them with standing to challenge the FAA.

B

The plaintiffs purport not to rely solely upon their fear of surveillance as a basis for standing to challenge the FAA. They offer what they characterize as a second, independent basis for standing: the costly and burdensome measures they have undertaken, as a result of that fear, to ensure the confidentiality of their international communications. The plaintiffs argue that such costs constitute "specific present objective harm[s]" suffered as a result of the passage of the FAA and therefore qualify as an injury in fact for purposes of standing. (Tr. 18.) The Government counters that any costs incurred by the plaintiffs have resulted not from the challenged

statute itself but from the alleged subjective chilling effect the statute has had on the plaintiffs' communications. The Government urges that the assertion of standing on the basis of a "subjective chill" of this kind is foreclosed by Supreme Court precedent.

The costs the plaintiffs have incurred in an effort to protect the confidentiality of their international communications fail to provide a basis for standing to challenge the constitutionality of the FAA. This second basis for standing is not truly independent of the first basis; the costs incurred by the plaintiffs flow directly from the plaintiffs' fear of surveillance. To allow the plaintiffs to bring this action on the basis of such costs would essentially be to accept a repackaged version of the first failed basis for standing. The plaintiffs cannot manufacture a sufficient basis for standing from an insufficient one.

The plaintiffs argue that their fear of surveillance has chilled their normal exchange of international communications and thereby forced them to incur certain costs to protect the confidentiality of those communications by carrying them out through alternative means. But because the plaintiffs have failed to show that they are subject to the FAA and that they face a threat of harm from its enforcement, the chilling of their speech that they attribute to the statute is actually the result of their purely subjective fear of surveillance. The Supreme Court has held that a subjective chill of this kind is insufficient to support standing. In *Laird v. Tatum*, 408 U.S. 1, 6 (1972), the Supreme Court considered a First Amendment challenge to an Army surveillance program that entailed "the collection of information about public activities that were thought to have at least some potential for civil disorder," and the dissemination

and storage of such information within the Army. The plaintiffs argued that they had standing to challenge the program because the existence of the program chilled the exercise of their First Amendment rights. The Court rejected the argument that a plaintiff "who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity" has standing to invoke the jurisdiction of a federal court. *Id.* at 10. Noting that the plaintiffs had failed to connect the existence of the surveillance program to their own speech, the Court held that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *Id.* at 13-14 & n.7 (internal quotation marks omitted). The Court distinguished its prior cases finding standing to challenge Government conduct that allegedly violated the First Amendment by chilling protected speech, explaining that "in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.* at 11.

Like the plaintiffs in *Laird*, the plaintiffs in this case allege that their communications are chilled by the sheer existence of the challenged policy without connecting the policy to their own speech. Therefore the analysis of the plaintiffs' second purported basis for standing in this case is controlled by *Laird*. In *Laird* "the chilling effect alleged . . . was so remote and speculative that there was no justiciable case or controversy and therefore the

federal courts lacked jurisdiction under Article III of the Constitution." *Davis v. Vill. Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978) (finding standing for First Amendment claim alleging that threat of eviction, manifested in attempt by defendant management company to terminate tenant plaintiff's lease, chilled plaintiff's expressive activity in connection with tenants' association). The same is true in this case, where the plaintiffs have failed to make any showing that they are subject to the FAA.

The plaintiffs insist that the Supreme Court's distinction in *Laird* between the challenged policy in that case and challenged exercises of Government power in previous cases that were "regulatory, proscriptive, or compulsory in nature" was only a distinction and not a prospective rule that plaintiffs may only challenge Government policies that are regulatory, proscriptive, or compulsory. *See Socialist Workers Party v. Attorney General of the United States*, 419 U.S. 1314, 1318 (1974) (Marshall, J., sitting as Circuit Justice) ("In my view . . . the Court [in *Laird*] was merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not."); *ACLU*, 493 F.3d at 693 n.3 (Gibbons, J., concurring) ("The language in *Laird* about regulation, proscription, and compulsion to me seems merely descriptive of the facts in prior cases in which the Supreme Court had found standing."); *but see ACLU*, 493 F.3d at 661 (Batchelder, J.) ("[T]o allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions. . . .").

It is unnecessary to decide whether an argument for standing based on a chill of expressive activity should be limited to cases in which the plaintiff is complaining about a statute or regulation that is "regulatory, proscriptive, or compulsory in nature" or whether a plaintiff can allege such a chill based on a statute or regulation to which the plaintiff is otherwise subject. The plaintiffs in this case have failed to show that they are subject to the statute other than by speculation and conjecture, which is insufficient for standing. The plaintiffs in this case have made no showing that they are subject to the statute they seek to challenge, and therefore have made no showing that they face a danger of being harmed as a result of the statute. In the standing context the indirect harm of a chilling effect on speech may only be asserted in conjunction with a danger of direct harm from the challenged statute, because that danger is the source of the chill. *See Laird*, 408 U.S. at 12-13 ("[G]overnmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights. At the same time, however . . . to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action.") (internal quotation marks and ellipsis omitted). As the Supreme Court explained: "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of future harm; the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *Id.* at 13-14 (internal quotation marks omitted).

A plaintiff's claim that a Government policy chills the plaintiff's expressive activity is not an independent basis to challenge the policy. The alleged chill must be grounded in a threat of harm from the policy to which the plaintiff can reasonably argue he is subject; otherwise the chill is plainly subjective. *Cf. Davis*, 578 F.2d at 463 (chilling effect grounded in threat of eviction). A chilling effect can only be a product of a threat of direct harm, not a "substitute" for such a threat. *Laird*, 408 U.S. at 14.

The plaintiffs argue that the chilling effect the FAA has had on their speech cannot be considered subjective because they have incurred real, objective costs to avoid surveillance. Embedded in that argument is a misunderstanding of what was meant in *Laird* by the term "subjective." In *Laird* the Supreme Court found that a plaintiff cannot establish standing by "alleg[ing] that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity. . . ." *Id.* at 10. What made the chilling effect subjective in *Laird* was the plaintiffs' failure to show that they were subject to the challenged policy and faced a threat of harm from it. The plaintiffs could only show that the surveillance policy existed. The plaintiffs' failure to substantiate the alleged chill with proof that they really were subject to the information gathering policy made their alleged chill "subjective." *See Ozonoff v. Berzak*, 744 F.2d 224, 229 (1st Cir. 1984) (Breyer, J.) (interpreting phrase "without more" in *Laird* to mean that "[t]he plaintiffs in *Laird* did *not* claim that the information gathering activities were directed against them specifically or that the gathered data could be directly used against them in any foreseeable way"). All of the plaintiffs' alleged "objec-

tive" expenditures are insufficient to establish standing because they all arise from the plaintiffs' choices to incur expenditures and costs that are not based on a sufficient showing that the statute in question was directed at them.

The Court of Appeals for the District of Columbia Circuit relied upon *Laird* in rejecting the allegation of a chilling effect as a basis for standing in *United Presbyterian*. The *United Presbyterian* Court denied standing to certain political and religious organizations to challenge an Executive Order that provided a framework for agencies within the intelligence community to seek and obtain approval from the Attorney General for certain kinds of surveillance. One of the bases for standing that was proffered by the plaintiffs and rejected by the Court was the assertion that their expressive activities were chilled by the fear that their communications would be surveilled under the Executive Order. *See United Presbyterian*, 738 F.2d at 1378. In rejecting this basis for standing, the Court explained that "[a]ll of the Supreme Court cases employing the concept of the 'chilling effect' involve situations in which the plaintiff has unquestionably suffered some concrete harm (past or immediately threatened) apart from the 'chill' itself." *Id.* In *United Presbyterian* the plaintiffs could not point to any such concrete harm because they could not show that "any specific action [was] threatened or even contemplated against them" with respect to the Executive Order. *Id.* at 1380.

The same analysis applies in this case. The plaintiffs have not shown that any specific action is threatened or contemplated against them because they have not shown that they are subject to the FAA. Therefore they have

failed to allege a concrete harm "apart from" the chilling effect on their international communications, and the chilling effect is their subjective fear of being surveilled which is insufficient in the absence of evidence that they are subject to surveillance under the statute. *Cf. ACLU*, 493 F.3d at 688 (Gibbons, J., concurring) (rejecting assertion of standing based on chilling effect together with assertion of standing based on "well-founded fear" of surveillance because "[t]he disposition of all of the plaintiffs' claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the [challenged surveillance program].").

The plaintiffs cite a number of cases allowing challenges to statutes or policies based on the chilling effect such statutes or policies had on a plaintiff's expressive conduct. But in each of those cases, the plaintiff was subject to the challenged policy and faced potential harm from the enforcement of the policy. In *Meese v. Keene*, 481 U.S. 465, 467 (1987), the plaintiff alleged that he was chilled from exhibiting three films because under the challenged statute they would be labeled "political propaganda," thereby injuring his reputation. Crucially, there was no question in *Meese* that the statute applied to the films the plaintiff wished to exhibit. *See Meese*, 481 U.S. at 467 n.1. That fact distinguishes *Meese* from this case. In holding that the plaintiff had standing in *Meese*, the Supreme Court emphasized that the plaintiff had shown that he faced a threat of harm from the statute if he chose to exhibit the films. *See id.* at 473 ("We find, however, that [the plaintiff] has alleged and demonstrated more than a 'subjective chill'; he establishes that the term 'political propaganda' threatens to cause him cognizable injury."). The Court explained that under

Laird, if the plaintiff could not show that the label of "political propaganda" would be harmful to him, he would not have standing to challenge the statute. *See id.* The plaintiff plainly could not have shown that the label would be harmful to him without showing that his films would be subject to the label. The finding that the plaintiff's films were subject to the challenged statute was a predicate to the finding of standing in *Meese* for which there is no corollary in this case.

The plaintiffs fare no better in their reliance on *Ozonoff*. In *Ozonoff*, the Court of Appeals for the First Circuit found standing to challenge an Executive Order based on the chilling effect it would exert on the plaintiff's expressive activity. *See Ozonoff*, 744 F.2d at 228. The Executive Order provided for a loyalty check, conducted by the Executive Branch, of persons who applied to work for the World Health Organization (the "WHO"). *See id.* at 225. The plaintiff in Ozonoff "would like to work" for the WHO, and thus there was no question that he was subject to the policy of loyalty checks and the potential harm of being denied a job with the WHO on account of being found disloyal if the policy were enforced. *Id.* The Court found standing based on the plaintiff's assertion that he planned to apply for a job with the WHO and the challenged policy chilled his expressive conduct by discouraging activity that might be considered disloyal. *See id.* at 228-29. The Court explained that the relevant inquiry was "whether the Order reasonably leads [the plaintiff] to believe he must conform his conduct to its standards." *Id.* at 229-30. In distinguishing the case from *Laird*, the Court made clear that the reasonableness of that belief depended on the plaintiff being subject to the challenged policy: "The plaintiffs in *Laird* did *not* claim that the information

gathering activities were directed against them specifically or that the gathered data could be directly used against them in any foreseeable way." *Id.* at 229 (emphasis in original).

The plaintiffs in this case have not shown that the challenged statute is directed against them. The chilling effect in *Ozonoff* was the result of the plaintiff's fear of harm from the enforcement of a policy to which he was subject. Because that much has not been shown in this case, the alleged chill of the plaintiffs' speech in this case is not analogous to the chill of the plaintiff's speech in *Ozonoff*. *Cf. also Socialist Workers Party*, 419 U.S. at 1315 (Marshall, J., sitting as Circuit Justice) (granting standing to challenge prospective surveillance of convention where plaintiffs "apparently learned that the FBI planned to monitor the . . . convention").

The plaintiffs claim to find support for their assertion of standing based on the chilling of their speech in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). In *Laidlaw*, the Supreme Court found that environmental groups whose members, among other things, wished to use and enjoy a river into which the defendant was dumping pollutants, had standing to sue the defendant.[15] *See Laidlaw*, 528 U.S. at 181-82. The Court found that the plaintiffs had demonstrated injury in fact based on the evidence that members of the plaintiff environmental groups were deterred from using the river by the defendant's pollution. *See id.* at 183. The plaintiffs suggest

---

[15] The plaintiffs in *Laidlaw* also included a person whose property value was allegedly diminished by the pollution of the river and another who would like to purchase a home near the river but did not intend to do so because of the pollution. *See id.* at 182.

that their own reluctance to engage in international communications is analogous to the reluctance of the *Laidlaw* plaintiffs to use the river. They extrapolate from that analogy that they have standing to challenge the FAA.

The plaintiffs' reliance on *Laidlaw* is plainly misplaced. *Laidlaw* did not concern an alleged chill of First Amendment activity, making any comparison between the plaintiffs' second purported basis for standing in this case and the plaintiffs' basis for standing in *Laidlaw* strained at best. In any event, *Laidlaw* does not help the plaintiffs. In *Laidlaw* the members of the plaintiff organizations had allegedly ceased to use the river because of the concrete harm caused by the defendant's discharge of pollutants into the river. The discharge of pollutants was already occurring and there was no question that the plaintiffs were affected by the discharge because they ceased to use the river as a result of the defendant's activity that allegedly harmed the river in which they had an environmental interest. *Cf. ACLU*, 493 F.3d at 689 (Gibbons, J., concurring) ("[I]n *Laidlaw*, the plaintiff's [sic] *fear of harm* from the defendant's undisputed conduct—conduct that would also undisputably affect plaintiffs personally if they undertook their desired activities—was sufficient to support standing.") (emphasis in original)).[16] In this case, the plaintiffs' reluctance to engage in their desired speech is self-imposed because their fear of surveillance under the FAA is an abstract and hypothetical one, for all of the

---

[16] Judge Gibbons explained: "I read *Laidlaw* to require that plaintiffs demonstrate that they (1) are in fact subject to the defendant's conduct, in the past or future, and (2) have at least a reasonable fear of harm from that conduct." *ACLU*, 493 F.3d at 689 (Gibbons, J., concurring).

reasons explained above. Thus the reasoning behind the finding of standing in *Laidlaw* does not support the plaintiffs' standing argument in this case.

The plaintiffs' reliance on *United States v. SCRAP*, 412 U.S. 669 (1973), fares no better. Like *Laidlaw*, *SCRAP* did not involve an alleged chill of First Amendment activity. Indeed, the analysis of standing in *SCRAP* did not concern any sort of deterrence or discouragement of the plaintiffs' behavior.

SCRAP concerned a challenge by environmental groups, among others, to a decision by the Interstate Commerce Commission (the "Commission") allowing railroads to collect a 2.5% percent surcharge on freight rates. *SCRAP*, 412 U.S. at 678. The plaintiff groups argued that the surcharge would harm them by making the use of recycled goods more expensive, thereby impacting forests and other natural environments that members of the plaintiff groups used and intended to use. *See id.* at 684-85. The Court acknowledged skepticism with respect to whether the plaintiffs would be able to prove that the surcharge would harm the areas of the environment in which the plaintiffs had an interest. *See id.* at 688 (referring to chain of causation as "attenuated"). Nevertheless, the Court found standing because the plaintiffs' allegations, "if proved, would place them squarely among those persons injured in fact by the Commission's action[.]" *Id.* at 690. The standing issue in *SCRAP* arose on a motion to dismiss based on the pleadings, and therefore the Court's doubts as to whether the plaintiffs would be able to prove that the surcharge would cause them harm did not bear on the standing analysis. *See id.* at 683-84.

It is difficult to understand how the plaintiffs can find any analogy between the standing analysis in *SCRAP* and their effort to allege standing in this case. In *SCRAP*, the conduct challenged by the plaintiffs was the Commission's authorization of the railroads to collect a surcharge that the plaintiffs alleged would injure them. The collection of the surcharge had already been authorized and the plaintiffs alleged facts that, if true, would "place them squarely among those persons injured" by the surcharge. The plaintiffs' fear of surveillance under the FAA in this case bears no relation to the plaintiffs' fear of harm from the surcharge in *SCRAP*. The plaintiffs in this case have neither alleged nor shown that surveillance encompassing their communications has been authorized or even that such authorization has been sought by the Government. Neither in *SCRAP* nor in any case cited by the plaintiffs has any court found that a plaintiff had standing to bring a lawsuit in circumstances remotely similar to these.

For all of the reasons explained above, the plaintiffs' second purported basis for standing cannot survive the failure of the first. Therefore the costs incurred by the plaintiffs in seeking to protect their international communications from surveillance under the FAA do not constitute a basis for standing for the plaintiffs' constitutional challenge to that statute.

CONCLUSION

For all of the foregoing reasons, the plaintiffs lack Article III standing to bring this constitutional challenge to the FAA. The plaintiffs' motion for summary judgment is **denied**. The Government's motion for summary judgment is **granted**. The Clerk is directed to

close Docket Nos. 6 and 12 and to enter judgment dismissing the complaint and closing this case.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 09-4112-cv

AMNESTY INTERNATIONAL USA, ET AL.,
PLAINTIFFS-APPELLANTS

v.

JAMES R. CLAPPER, JR., ET AL.,
DEFENDANTS-APPELLEES

Filed: Sept. 21, 2011

ORDER

Following disposition of this appeal on March 21, 2011, Defendants-Appellees James R. Clapper, Jr. *et al.* filed a petition for rehearing *in banc*. A poll of the active members of the Court having been conducted, and there being no majority favoring *in banc* review, rehearing *in banc* is hereby **DENIED**.

GERARD E. LYNCH, *Circuit Judge*, concurs by opinion in the denial of rehearing *in banc*.

REENA RAGGI, *Circuit Judge*, joined by DENNIS JACOBS, *Chief Judge*, JOSÉ A. CABRANES, RICHARD C. WESLEY, and DEBRA ANN LIVINGSTON, *Circuit Judges*, dissents by opinion from the denial of rehearing *in banc*.

DEBRA ANN LIVINGSTON, *Circuit Judge*, joined by DENNIS JACOBS, *Chief Judge*, JOSÉ A. CABRANES, REENA RAGGI, and RICHARD C. WESLEY, *Circuit Judges*, dissents by opinion from the denial of rehearing *in banc*.

DENNIS JACOBS, *Chief Judge*, dissents by opinion from the denial of rehearing *in banc*.

PETER W. HALL, *Circuit Judge*, dissents by opinion from the denial of rehearing *in banc*.

FOR THE COURT:

/s/ CATHERINE O'HAGAN WOLFE
CATHERINE O'HAGAN WOLFE
Clerk

GERARD E. LYNCH, *Circuit Judge*, concurring in the denial of rehearing *en banc*:

While I usually consider opinions concurring in a denial of en banc review unnecessary, I write briefly in response to my colleagues' dissents from denial of rehearing en banc because, in the absence of any panel dissent, some of their criticisms have not previously been aired. For the most part, the panel opinion speaks for itself; answers to nearly all of the dissents' points can be found there. *See Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011). Nevertheless, I take this opportunity to respond directly to a few points.[1]

As an initial matter, I agree with the dissenters that this case clearly satisfies Federal Rule of Appellate Procedure 35(a)(2)'s exceptional-importance requirement. And I acknowledge that it may be in some tension with opinions from other circuits (although, as discussed below, those cases are largely distinguishable from this one). But I dispute the dissenters' assertions that *Amnesty* somehow distorts the law of standing or, in Judge Livingston's words, "threatens a *sub silentio* transformation of this Circuit's case law." Livingston, J., Op. Dissenting from Denial of Reh'g En Banc ("Livingston, J., Op."), *post* at [1]; *see also* Raggi, J., Op. Dissenting from Denial of Reh'g En Banc ("Raggi, J., Op."), *post* at [3]. Standing cases are inherently fact specific, and the panel opinion takes pains to make clear that our conclusions regarding standing were limited to this statute, these plaintiffs, and the facts of this case. Furthermore, for the reasons articulated in the panel opinion and be-

---

[1] As senior judges, Judges Calabresi and Sack—the other members of the panel that heard the appeal—are not eligible to participate in deciding whether to grant a petition for rehearing en banc.

low, *Amnesty* fully coheres with established standing doctrine and does not represent a departure from our controlling precedents.

I. Summary Judgment Standard

A theme that runs through all of the dissents is that the panel should have treated the plaintiffs' averments more skeptically. One dissent, for example, criticizes us for our overly "credulous[]" and insufficiently skeptical reading of the record. *See* Jacobs, C.J., Op. Dissenting from Denial of Reh'g En Banc ("Jacobs, C.J., Op."), *post* at [3]; *see also* Raggi, J., Op., *post* at [22-25]. But any "credul[ity]" displayed by the opinion reflects not any naïveté on the part of the panel, but the requirements of the procedural posture of the case. The case came to us on summary judgment, and the government expressly chose to accept the plaintiffs' allegations as true for purposes of the standing motion.[2] Thus, the panel opinion reviews the record as we are required to review it: accepting the plaintiffs' allegations as true, drawing all reasonable factual inferences in their favor, and viewing their factual assertions in the light most favorable to them. As this Court has long held, even if evidence "greatly taxes the credulity of the judge," that alone

---

[2] *See Amnesty*, 638 F.3d at 129 ("The government did not submit any evidence of its own either in opposition to the plaintiff's submissions, or in support of its own summary judgment motion. Additionally, at oral argument on the summary judgment motions, the government said it accepted the factual submissions of the plaintiffs as true for purposes of those motions."); *id.* at 141 ("The plaintiffs have . . . testfi[fied] that they have altered their conduct and thereby incurred specific costs in response to the FAA. As discussed above, we must accept that undisputed testimony . . . ."); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (on summary judgment, evidence to support standing "will be taken to be true").

does not justify a grant of summary judgment. *See Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946) (citation omitted).

Judge Raggi points out, correctly, that where the court's subject matter jurisdiction is at issue, as in the case of constitutional standing, courts have an "'independent obligation'" to question even undisputed facts, necessary to the court's jurisdiction, that are asserted by parties. *Post* at [25] (quoting *Ariz. Christian Sch. Tuition Org., v. Winn*, 131 S. Ct. 1436, 1454 (2011)). Certainly, parties cannot confer jurisdiction on the court by stipulating to facts that are false. But this is hardly an example of collusive stipulation to facts that, as Chief Judge Jacobs would have it, are fanciful. *See post* at [1, 5, 7]. As the panel opinion carefully notes, the plaintiffs' sworn testimony about their activities, and about their reasons for believing that their communications are likely to be intercepted if the government uses the authority provided by the FAA, are anything but implausible.

There is no reason to believe that the government, which vigorously contests standing, is collusively declining to challenge the plaintiffs' factual presentation in order to obtain a decision on the merits by creating an illusion of jurisdiction on the part of the court. The court's obligation to question assertions of fact does not extend permission for judges to substitute their own beliefs—derived from their own notions about what is and is not likely to be true—about the truth of the sort of ordinary factual matters that are eminently determinable by the usual factfinding processes of the court, but that the moving party (and especially the government,

which has ample resources to litigate those matters) declines to challenge.

Because the plaintiffs' facts were uncontroverted, they necessarily constituted the main basis on which the panel could assess standing. There is precedent for declining to rule on standing and remanding the issue to the district court. *See, e.g., Fund for Animals v. Babbitt*, 89 F.3d 128, 134 (2d Cir. 1996). But in that case, the issue of standing "was neither ruled on by the district court nor fully briefed by the parties." *Id.* In *Amnesty*, by contrast, the standing issue was ruled on by the district court and fully briefed by both sides. The panel fully satisfied its "independent obligation" to assess the plaintiffs' standing.

II. The Statute

The dissenters go to great lengths to downplay the significance of the changes contained in the FISA Amendments Act ("FAA"), and to suggest that the panel somehow misinterpreted the statute's scope or operation. *See, e.g.*, Raggi, J., Op., *post* at [30-32].

As the panel opinion explains, the FAA indisputably and significantly broadens the risk of interception, lowers the government's probable-cause burden, and decreases the oversight role of the Foreign Intelligence Surveillance Court ("FISC"). Prior to the FAA, the government was required to identify its specific surveillance targets to the FISC. The FISC would issue a warrant only if it found there was probable cause that the target was a foreign power or an agent of a foreign power, and that the target was using or about to use the facility to be monitored. In other words, the FISC had to find probable cause for each specific search, and maintained

a continuing oversight role after each probable-cause determination. *See Amnesty*, 638 F.3d at 122-24.

The FAA significantly alters these procedures. Under Section 702 of the FAA, the FISC need only find that the government's general procedures comply with the statute's subsections and with the Fourth Amendment; the probable-cause determinations are no longer particularized. The Attorney General no longer needs to identify specific surveillance targets to the FISC. *See* 50 U.S.C. § 1881a(g)(4). The FAA requires him (and the Director of National Intelligence) only to provide "written certification" that targets are outside the United States. *Id.* § 1881a(g)(1)(A). The FISC, in order to issue a warrant, must find only that the executive's targeting procedures are "reasonably designed to" (i) ensure that any acquisition conducted under the authorization "is limited to targeting persons reasonably believed to be located outside the United States," and (ii) "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." *Id.* § 1881a(i)(2)(B). The FISC no longer considers individual surveillance applications, but rather is charged only with overseeing whether the agency has complied with FISA's general procedural requirements. *Id.* § 1881a(i)(2), (3)(A). The dissents make much of the FAA's requirement that the FISC determine whether the government's procedures comply with the Fourth Amendment, but, again, under the FAA that analysis is limited to the government's *general procedures*. Unlike the prior FISA regime, the FISC plays

no role in reviewing the basis for any particular surveillance undertaken by the government.[3]

Additionally, as the opinion explains, "[u]nder the FAA, in contrast to the preexisting FISA scheme, the FISC may not monitor compliance with the targeting and minimization procedures on an ongoing basis. Instead, that duty falls to the AG and [Director of National Intelligence], who must submit their assessments to the FISC, as well as the congressional intelligence committees and the Senate and House Judiciary Committees." *Amnesty*, 638 F.3d at 125 (citing 50 U.S.C. § 1881a(*l*)(1)).

The government itself admits that the FAA differs significantly from the previous version of FISA. In its petition for rehearing en banc, the government notes, for example, that "[u]nlike traditional FISA surveillance, Section 702 does not require the Government to establish individualized probable cause or to identify the specific facilities at which the acquisition will take place." Pet. for Reh'g 4. Indeed, Congress presumably would not have bothered to amend FISA if the new version of the statute were not appreciably different from the old. And as the opinion makes clear, proponents of the statute argued that it was necessary precisely because it made possible expanded surveillance that would not have been permitted under prior law. *See Amnesty*, 638 F.3d at 122; *see also* 154 Cong. Rec. H5756 (daily ed. June 20, 2008) (statement of Rep. Smith); 154 Cong.

---

[3] In making this point, I in no way suggest that such a specific review is constitutionally required. That is one of the issues to be addressed on the merits. The point is only that the FAA *changes* the prior regime, in a way that adversely affects the plaintiffs' situation and makes surveillance easier and therefore more likely.

Rec. S6178-79 (daily ed. June 26, 2008) (statement of Sen. Graham). Nor did the government ever "identify what is wrong with the plaintiffs' interpretation [of the FAA], or what a more appropriate interpretation would be. At oral argument, we asked the government to clarify what it found inaccurate in the plaintiffs' characterization, and again it failed to do so." *Amnesty*, 638 F.3d at 128 n.8.[4] At no point has the government explained why the plaintiffs' or the panel's characterization of the FAA is inaccurate.

III. Standing

Turning to the standing analysis, it is common ground that standing requires injury in fact, causation, and redressability. The dissents seem to suggest that the opinion somehow muddles these well-established requirements, *see, e.g.*, Livingston, J., Op., *post* at [3-9], when in fact the opinion analyzes each element separately and in detail, *see Amnesty*, 638 F.3d at 131-45. The plaintiffs demonstrated present injuries in fact by "alleg[ing] . . . the expenditure of funds." *Id.* at 133. Their declarations—which, as discussed previously, we are bound to accept as true and which the government accepted for purposes of summary judgment—"establish[ed] that they have already incurred professional and economic costs to avoid interception." *Id.*

---

[4] As noted in the panel opinion, the plaintiffs alleged that under the FAA, "an acquisition order could seek, for example, '[a]ll telephone and e-mail communications to and from countries of foreign policy interest —for example, Russia, Venezuela, or Israel—including communications made to and from U.S. citizens and residents.' Moreover, the specific showing of probable cause previously required, and the requirement of judicial review of that showing, have been eliminated. The government has not directly challenged this characterization." *Amnesty*, 638 F.3d at 126.

The plaintiffs satisfied the causation requirement because "the professional and economic harms [they] suffered . . . were fairly traceable to the FAA." *Id.* at 134. And they demonstrated redressability because the discrete injury of which they complained—the increased likelihood of interception specifically caused by the FAA—would be relieved by a decision in their favor. *See id.* at 140 n.24.

The dissents also seem to misunderstand our injury analysis. The opinion addresses two different theories of injury: present injury and future injury. As to present injuries, the opinion explains that the plaintiffs' undisputed (for purposes of this motion) economic and professional harms are an injury in fact, and the same analysis that supports the conclusion that the plaintiffs' present-injury theory satisfies the causation prong *further* supports the conclusion that the plaintiffs' future-injury theory properly satisfies the injury-in-fact prong. *See id.* at 133-40.

Furthermore, it is emphatically not the case that, as one dissent contends, "[t]he panel opinion bases its finding of injury and causation entirely on the ethical duties of lawyers and the affidavits of the lawyer plaintiffs." Jacobs, C.J., Op., *post* at [4]. The opinion makes abundantly clear that the panel's analysis is not focused exclusively on lawyers. The plaintiffs' evidence of sensitive communications affected by the statute, cited in detail in the opinion, concerned journalists as well as lawyers, and referred to numerous categories of conversations of a sort not limited to attorneys.[5] Indeed, the

---

[5] *See, e.g., Amnesty*, 638 F.3d at 127 ("The plaintiffs' [undisputed] evidence tended to show that their work 'requires them to engage in sensitive and sometimes privileged telephone and e-mail communica-

panel concluded that a lawyer's ethical duties and a journalist's prudent exercise of her role brought us to the same conclusion—that is, all of the plaintiffs reasonably incurred professional and economic costs in order to protect clients or sources.[6]

---

tions with colleagues, clients, journalistic sources, witnesses, experts, foreign government officials, and victims of human rights abuses located outside the United States.'"); *id.* at 127 n.11 ("Journalist Naomi Klein . . . communicates with sources abroad, including Mexican individuals regarding military activity in Chiapas, Argentinian advocates for indigenous rights, and indigenous Colombian groups who oppose U.S. trade policies. Likewise, journalist Chris Hedges, whose writing focuses on American and Middle Eastern politics and society, maintains regular contact with academics, journalists, politicians, and activists in places such as Iran, Syria, Libya, Kosovo, Bosnia, and Sudan. He also communicates with political activists and civil society leaders in Palestine, whom he believes are 'of interest' to the U.S. government."); *id.* at 143 ("[T]he various groups of plaintiffs—attorneys, journalists, and human rights, labor, legal, and media organizations—have established that they have legitimate interests in not being monitored."); *id.* ("Journalists Klein and Hedges, for example, assert that if their communications with their sources were overheard, those sources' identities, political activities, and other sensitive information would be disclosed, which would expose them to violence and retaliation by their own governments, non-state actors, and the U.S. government."); *id.* at 144 n.27 ("Both the attorneys and the non-attorneys have reason to fear being monitored under the challenged statute . . . .").

[6] Judge Livingston argues that these plaintiffs have suffered no actual or imminent harm. *Post* at [1-3]. If I simply answer, as she contends, "Not so," that is because it simply is not so. The plaintiffs have sworn that they have suffered harm, in that it has become more difficult and expensive to practice their professions as a result of the enactment of the FAA, and the government has chosen not to contest that evidence. The dissenters' argument is not that these costs have not been imposed upon the plaintiffs, but that the courts should not recognize this kind of harm as conferring standing. That argument is not unreasonable; the question is a close one. But it should not be pretended that these harms do not exist, or that the requirement that only persons

Next, one of the dissents submits that "any burden imposed on plaintiffs by the risk of [FAA-authorized] surveillance arose under the pre-FAA regime as well." Jacobs, C.J., Op. 7. But for the reasons already discussed, and as explained in detail in the opinion, the FAA significantly broadens the risk of interception beyond that which existed under the previous version of FISA. Furthermore, as explained in the panel opinion, because the government "accepted the factual submissions of the plaintiffs as true for purposes of [the summary judgment] motions," we "must accept the plaintiffs' evidence as undisputed explanations of how the FAA has affected them." *Amnesty*, 638 F.3d at 129.[7]

---

with a concrete stake in the matter may seek judicial relief is violated in some unquestionable way when persons whose lives and occupations have been affected by changes in the law are permitted to raise constitutional objections to those changes. The decision to close the courthouse door to such claims is an exercise of judicial power that must stand or fall on the strength of the proffered reasons why such harm does not satisfy the purposes of the standing rule. For the reasons stated in the panel opinion, it will not do to write off the plaintiffs as simply folks who, unhappy with the Congress's resolution of the policy arguments for and against the FAA, seek to continue the political "discussion," Raggi, J., Op., *post* at [5 n.3]. As the standing doctrine requires, they are people who assert that the law has specifically affected them in a way that gives them a concrete stake in the controversy, and thus a right to present their arguments (persuasive or otherwise) that the statute infringes rights conferred on them by the Constitution.

[7] *See also Amnesty*, 638 F.3d at 129 n.13 ("At oral argument on this appeal, the government professed itself 'puzzled' as to why the plaintiffs had not been just as nervous about being monitored before the FAA was enacted as they are now. To the extent that that statement questioned whether the plaintiffs genuinely fear being monitored after the FAA's enactment more than they did before it, the government cannot raise that challenge on appeal. . . . The time to challenge the accuracy of the plaintiffs' assertions in their declarations has passed. The gov-

The dissents further contend that the plaintiffs lack standing because their asserted injuries are not redressable. *See* Jacobs, C.J., Op., *post* at [6-8]; Raggi, J., Op., *post* at [33-38]. But the plaintiffs' uncontroverted testimony indicated that their contacts believed they were more likely to be monitored under the FAA than under the previous version of FISA. In their Local Rule 56.1 Statement—which, I repeat at risk of redundancy, the government declined to dispute—the plaintiffs said that "the threat of surveillance under the new law has a much greater impact on their work than previous U.S. government surveillance." *Amnesty*, 638 F.3d at 129 n.13 (internal quotation marks and alterations omitted). Thus, we concluded that the plaintiffs had "established that the relief they seek would redress their asserted injuries in fact, because their injuries stem from their reasonable fear of being monitored by FAA-authorized government surveillance, and if a court grants their requested relief—an injunction prohibiting the government from conducting surveillance under the FAA—the feared surveillance would no longer be permitted and therefore would, presumably, no longer be carried out." *Id.* at 140 n.24.[8]

---

ernment could have filed its own evidence, or sought an evidentiary hearing on the accuracy of the plaintiffs' claims, but it did neither.").

[8] Judge Raggi appears to question whether plaintiffs can assert a Fourth Amendment right not to be surveilled, given that any surveillance authorized by the FAA would not have targeted them, rendering them mere "coincidental interceptees." *Post* at [11-12]. This seems to be a question about the *merits* of the plaintiffs' claims, rather than about their standing to make them. Plaintiffs claim that *they* have a right not to have their conversations intercepted by surveillance that is not based on specifically targeted probable cause. The merits of this claim, especially given the urgent justifications for the surveillance likely to be asserted by the government, may well be questionable. But

In addition, contrary to the dissents' contentions, *see, e.g.*, Jacobs, C.J., Op., *post* at [7-8], to establish redressability the plaintiffs need not show that a judgment in their favor would prevent *all* possible interception, or that they would not suffer injuries under the pre-FAA version of FISA. "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982). Where a challenged action increases an already extant risk of harm to a plaintiff, the elimination of that action would redress the harm it causes—even if it does not eliminate the preexisting risk. *Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007).

The dissents also make much of the timing of the plaintiffs' challenge, pointing out that the plaintiffs filed their suit on the same day that the FAA was passed. This fact is not unusual in the context of a facial challenge, and in any event has no bearing on whether the plaintiffs could have suffered actual injury as a result of the government's use of its authority under Section 702.

Judge Raggi's suggestion that *United States v. White*, 401 U.S. 745 (1971), disqualifies "coincidental interceptees" from asserting a Fourth Amendment interest is unpersuasive. *White* rejected a Fourth Amendment claim by a person who voluntarily confided in an acquaintance who voluntarily recorded the conversation and reported it to the authorities. Such consensual recording is not analogous to non-consensual interception. If the mere fact that the targets of the surveillance, as non-United States persons abroad, have no right to contest electronic surveillance of their conversations entailed that no American who was overheard could object to the surveillance either, plaintiffs would not have standing even if they knew for certain they had been intercepted, and American citizens' conversations with foreigners abroad would have no protection whatsoever.

Indeed, there would seem to be no difference between the "reasonable likelihood" that the plaintiffs will be surveilled under the FAA on day one of the FAA's effect and the likelihood that they will be surveilled on any other day in the future.

Finally, the dissents repeatedly characterize as "speculative" the plaintiffs' assertion that their overseas contacts are likely to be government targets under the FAA. This characterization is hard to take seriously. As the opinion explains, the plaintiffs' overseas contacts include, for example, alleged Al Qaeda members (and Guantanamo detainees) Khalid Sheik Mohammed and Mohammedou Ould Salahi, as well as those men's families. *See Amnesty*, 638 F.3d at 127 n.11. Furthermore, as discussed above, the government accepted the plaintiffs' factual submissions as true for summary judgment purposes, and never submitted evidence of its own. The plaintiffs reasonably asserted that their contacts were "likely targets of FAA surveillance," and the government never "disputed that assertion." *Id.* at 139.[9] The

---

[9] Judge Raggi argues that the plaintiffs "can only speculate" about whether FAA surveillance of themselves or their foreign contacts is "certainly impending," notwithstanding that she "assumes" that the executive *will* exercise FAA authority, which, she further assumes, encompasses "dragnet surveillance." *Post* at [27]. The contradiction is palpable. How can the costs and burdens asserted by plaintiffs be denigrated as "self-inflicted," Livingston, J., Op., *post* at [3], when it is assumed that the FAA authorizes secret "dragnet surveillance" centered on targets that these specific plaintiffs (as distinct from most Americans) have legitimate reasons to engage? Of course, given the necessarily secret nature of the interceptions authorized by the FAA, the plaintiffs almost certainly will *never* know with the certainty and specificity demanded by Judge Raggi that their conversations have been overheard as a result of FAA surveillance orders. But on the assumptions that Judge Raggi makes—which seem to me unquestionably correct—

plaintiffs here, in short, have incurred present, concrete costs, because their fear of being subjected to surveillance is reasonable.[10]

IV. Circuit Split

Judge Raggi contends that the panel opinion creates a circuit split concerning the standards for "evaluating standing to challenge foreign intelligence surveillance programs." Raggi, J., Op., *post* at [3]; *see also id.* at [27-30]. While I concede that *Amnesty* is in some tension with *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), and *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007)—the two principal cases with which the dissenters argue that *Amnesty* creates a circuit conflict—*Amnesty* is nevertheless distinguishable in several ways from those cases. I will describe a few points of distinction here; the panel opinion itself provides a fuller discussion. *See Amnesty*, 638 F.3d at 148-49.

United Presbyterian Church concerned a "generalized challenge" to "the constitutionality of the entire national intelligence-gathering system," 738 F.2d at 1381 (internal quotation marks omitted), whereas the present case involves a specific challenge to a specific statute. Furthermore, the D.C. Circuit found that the plaintiffs' injuries were not concrete, but amounted to

---

the plaintiffs have every reason to believe that such interceptions will occur, and to take costly and burdensome steps in the present if they wish to avoid that result. Their professional lives have thus been directly affected by the existence of the FAA.

[10] In contrast, the plaintiff in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), could not, as Judge Raggi suggests, *post* at [14], have given himself standing by choosing to move out of the city, precisely because he did *not* have any reasonable expectation that he would be subjected to chokehold tactics in the future.

little more than a subjective "chilling effect." *Id.* at 1378-80. In the present case, by contrast, the plaintiffs have attested that they suffered concrete harms—including the expenditure of funds—and the government has not offered contrary evidence.

ACLU v. NSA is similarly distinguishable, as it involved a challenge not to specific legislation, but rather to the National Security Agency's warrantless wiretap program, which targeted individuals the government believed to be associated with Al Qaeda. 493 F.3d at 648. In the present case, by contrast, the plaintiffs challenge a statute that, they argue, "permits dragnet surveillance—including surveillance directed at entire geographic areas." Appellants' Br. 48. They contend that under such a "dragnet," their communications "are far more likely to be acquired . . . than under a program of individualized surveillance that focuses solely on the communications of terrorism suspects," and that dragnet surveillance poses "far graver" consequences to them than the warrantless wiretapping posed to the plaintiffs in *ACLU v. NSA*. *Id.* Additionally, in that case, the government argued that it would not be able to address the question of standing without disclosing state secrets. *ACLU v. NSA*, 493 F.3d at 650. As the *Amnesty* plaintiffs correctly point out, in the present case "the government has not invoked the state secrets privilege and has not controverted plaintiffs' assertion that their communications are likely to be acquired under the statute." Appellants' Br. 49.

The dissents also insist that the panel opinion defies Supreme Court and Second Circuit precedents. *See, e.g.*, Raggi, J., Op., *post* at [3] (the panel opinion is "wholly at odds with Supreme Court precedent");

Livingston, J., Op., *post* at [1] ("in frank disregard of clear Supreme Court authority"). The panel opinion articulates its reasoning in great detail and explains why our holding comports with relevant Supreme Court and Second Circuit precedent. *See Amnesty*, 638 F.3d at 131-49. I will therefore let those portions of the opinion speak for themselves.

* * *

The critical inquiry for standing is whether the plaintiffs are simply citizens with an abstract claim that some action was unlawful, or whether they, in some particular respect not shared by every person who dislikes the action, are injured by that action. Here, the plaintiffs have shown that the very existence of an expanded authority for the government to monitor electronic communications with foreigners leads them reasonably to fear that their communications will be intercepted, and that this fear inhibits their lawful activities and requires them to take costly actions to avoid such interception. The government, despite every opportunity to contest the plaintiffs' factual claims, chose to accept them as true. Nor does the government dispute that the new authority provided by the FAA expands the government's authority to wiretap and reduces judicial supervision of such surveillance.

The suggestion that the government is not certain to use that authority—which was sought and provided by Congress on the ground that it was necessary to protect the national security—is fanciful. And in any event the harm claimed by the plaintiffs is not simply that their communications may be intercepted, but that the very existence of the authority to intercept them itself causes the harm of which they complain. The plaintiffs there-

fore are not just people who don't like the law; they are people who reasonably contend that the law imposes a burden on them.

It is important to remember what is at stake here. The government contends, with great facial plausibility, that the law is fully consistent with the Fourth Amendment's prohibition of unreasonable searches and seizures, because the paramount necessity of protecting the nation's security against very real and dangerous external threats requires the limited additional burden on a discrete category of international communications imposed by the statute.

The plaintiffs face a difficult road in persuading a court that this is not so. There are strong arguments against the plaintiffs' position on the merits, and they will be strongly made by the government as this case goes forward. In the absence of any representations by the government that addressing these questions would disclose state secrets, *cf. ACLU v. NSA*, 493 F.3d at 650, those arguments should be presented, and presented forcefully, to the courts. But those who would close the courthouse door to the plaintiffs do not rely on those arguments. Instead, they seek to avoid having to make them. To reject the plaintiffs' arguments not because they lack merit, but because we refuse to hear them, runs a much graver risk than whatever invasion of plaintiffs' privacy might be occasioned by the surveillance authorized by the challenged statute. The Constitution sets limits on the powers even of Congress. It is the glory of our system that even our elected leaders must defend the legality of their conduct when challenged. Short-circuiting that process risks not only that we will be governed by unconstitutional laws, but also that legit-

imate exercises of the lawmaking power will exist under a cloud, undispelled by the light of objective reasoning.

REENA RAGGI, Circuit Judge, with whom Chief Judge JACOBS, Judge CABRANES, Judge WESLEY, and Judge LIVINGSTON join, dissenting from the denial of rehearing *en banc*:

A panel of this court recognizes plaintiffs' standing to mount a facial Fourth Amendment challenge to an act of Congress that authorizes foreign intelligence surveillance subject to statutory conditions, court order, congressional supervision—*and* compliance with the Fourth Amendment. The panel reaches this conclusion even though plaintiffs cannot be targeted for surveillance under that statute, cannot demonstrate actual or imminent interception of any of their communications, and may in fact never experience such interception.

The panel concludes that plaintiffs' professed *fear* of interception under the statute is sufficient to support standing because the fear is not "irrational," and plaintiffs incurred costs to conduct conversations in person rather than risk interception. A rule that allows a plaintiff to establish standing simply by incurring costs in response to a not-irrational fear of challenged conduct is unprecedented. On that theory, every mobster's girlfriend who pays for a cab to meet with him in person rather than converse by telephone would be acting on a not-irrational fear of Title III interception and, therefore, have standing to challenge that statute.

In fact, Supreme Court precedent provides otherwise, holding that a subjective fear of challenged government conduct is insufficient to support standing, and

that forbearance action can do so only when a plaintiff would otherwise *certainly* be subject to the challenged conduct. The panel's reduced standing standard is so at odds with this precedent as to compel rejection *en banc*. Because this court, by an equally divided vote, declines to convene for that purpose, I respectfully dissent.

1. Background

In 2008, Congress amended the Foreign Intelligence Surveillance Act of 1978 ("FISA") by adding § 702, which authorizes foreign intelligence surveillance of non-United States persons located outside this country consistent with the Fourth Amendment and pursuant to court order and congressional oversight. *See* FISA Amendments Act of 2008 ("FAA"), Pub. L. No. 110-261, § 101(a)(2), 122 Stat. 2436 (codified at 50 U.S.C. § 1881a).[1] Plaintiffs are United States persons who (1) cannot, as a matter of law, be targeted for FAA surveillance; (2) offer no evidence that their communications ever have been intercepted pursuant to the FAA; and (3) may in fact never be so intercepted. Nevertheless, they assert standing to challenge the law's facial constitutionality and to seek to enjoin all FAA surveillance based on their professed fear of coincidental inter-

---

[1] FISA defines "United States person" to mean a citizen or permanent resident of the United States; unincorporated associations, a substantial number of whose members are citizens or permanent residents of the United States; and corporations incorporated in the United States, unless qualifying as a "foreign power" under the statute. 50 U.S.C. § 1801(i).

The FAA allows the executive to target only non-United States persons reasonably believed to be located outside this country in order to acquire foreign intelligence information. *See id.* § 1881a(a)-(b).

ception in the course of their work-related communications with foreign contacts who might be FAA targets.

On cross-motions for summary judgment, the district court carefully reviewed Supreme Court precedent and concluded that plaintiffs lacked standing because their subjective fear of interception was too speculative to demonstrate the requisite actual or imminent injury. *See Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009). A panel of this court reversed, concluding that plaintiffs established standing because they sustained actual injury by incurring costs to meet with foreign contacts rather than risk interception of their electronic communications. *See Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011). The panel ruled that plaintiffs who incur costs to avoid feared government action have standing to challenge that action as long as their fears are not "fanciful," "irrational," or "clearly unreasonable." *Id.* at 133, 135. The panel concluded that plaintiffs satisfied this standard because their fears of interception "are based on a reasonable interpretation of the challenged statute and a realistic understanding of the world." *Id.* at 139.

This analysis pronounces a novel, relaxed standing standard wholly at odds with Supreme Court precedent. Further, the adoption of such a standard creates a split between this court and our sister circuits in evaluating standing to challenge foreign intelligence surveillance programs. *See Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007); *ACLU v. NSA*, 493 F.3d 644, 656 (6th Cir. 2007); *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (Scalia, J.). No member of the court here disputes the "exceptional importance" of these concerns. Fed. R.

App. P. 35(a)(2). Meanwhile, a significant number views the panel decision as fundamentally flawed for reasons discussed in detail in this opinion.[2] Nevertheless, with little more than a token response from the author of the panel opinion, the court refuses to rehear the case *en banc*. I respectfully dissent from that decision.

2. The Nature of Plaintiffs' Claim Warrants Particular Attention in Assessing Standing

The panel's novel conclusion—that self-incurred costs can establish standing whenever occasioned by a not-irrational fear of being affected by challenged government conduct—would warrant *en banc* review in any case. This, however, is hardly "any case." Three features merit mention before discussing the panel's general failure to follow Supreme Court standing precedent.

First, plaintiffs sue to strike down an act of Congress. That circumstance, by itself, demands an "especially rigorous" standing inquiry. *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). The rigorous inquiry requirement derives from the Constitution's separation of powers and serves to maintain the proper balance between the least and most democratic branches of the federal government. *See Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1441-42 (2011) (observing that "[f]or the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character"); *Valley Forge Christian Coll. v. Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (recognizing that federal courts do not wield an "uncon-

---

[2] Further reasons for concern are discussed in opinions filed today by Chief Judge Jacobs and Judge Livingston.

ditioned authority to determine the constitutionality of legislative or executive acts"); *see also* Livingston, J., Op. Dissenting from Denial of Reh'g En Banc ("Livingston, J., Op."), *post* at [11-12]. Thus, while a court should not hesitate to recognize standing to challenge federal law where rigorous inquiry demonstrates it exists, a court cannot excuse a party from that rigorous inquiry simply by proclaiming it "the glory of our system that even our elected leaders must defend the legality of their conduct when challenged." Lynch, J., Op. Concurring in Denial of Reh'g En Banc ("Lynch, J., Op."), *ante* at [17-18].[3]

---

[3] The pronouncement is not quite accurate. To be sure, elected leaders must "defend" their conduct—lawful or not—at the ballot box at regular intervals. But they need not defend it *in court* "when[ever] challenged." Lynch, J., Op., *ante* at [18]. Rather, they must do so only when the challenging party can demonstrate an actual or imminent personal injury caused by that conduct. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992) (observing that injury element of standing requires more than "alleged violation of a right to have the Government act in accordance with law"). It is this standing issue that half of the active members of the court wish to discuss further *en banc*, and Judge Lynch cannot justify the court's denial of *that* discussion by charging us with fear of another, *i.e.*, the merits of plaintiffs' claim. *See* Lynch, J., Op., *post* at [17]. Much less can he insinuate that we in the dissent are somehow less sensitive than he to the judiciary's proper role in reviewing constitutional challenges to acts of Congress. Indeed, it was Chief Justice Marshall—a jurist with no crabbed view of the judiciary's role or fear of legal discussion—who cautioned that if judicial power were "extended to every *question* under the constitution," federal courts might take possession of "almost every subject proper for legislative discussion and decision," a result unwarranted in a democratic republic. 4 Papers of John Marshall 95 (C. Cullen ed. 1984) (quoted in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)). Mindful of this admonition, the Supreme Court has long been careful to observe the "role assigned to the judiciary" within the Constitution's "tripartite allocation of power." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Consistent

Second, plaintiffs cannot themselves be targets of the statute they seek to invalidate. That fact requires them to make a "much more" convincing showing of standing than would be demanded of a target. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (stating that it is ordinarily "substantially more difficult" to establish standing to challenge government action that targets someone else (internal quotation marks omitted)). The requirement is based on a prudential concern with ensuring that a party who wishes to use the courts rather than the public square to attack legislation asserts his own concrete claim of injury rather than those of third parties. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). This prudential rule "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *United States v. Raines*, 362 U.S. 17, 22 (1960).

This last point assumes greater significance in light of a third feature of the case: the nature and source of the personal right asserted by plaintiffs are unclear. "Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. at 500 (internal citation omitted). In short, to determine whether a party satisfies the injury prong of standing, a court must understand what "legally protected interest" has been

---

with that role, when a party whose opposition to legislation has failed to carry the day in congressional debate seeks to revive the "discussion" in the courts, the law quite reasonably demands a rigorous inquiry into standing, requiring the party to demonstrate that he is not simply disgruntled, but actually injured by the law he challenges.

invaded. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560. The question requires particular attention when, as here, Fourth Amendment rights are asserted. *See generally Rakas v. Illinois*, 439 U.S. 128, 138-41 (1978) (recognizing that identification of standing and substantive Fourth Amendment rights are "intertwined").[4]

Plaintiffs submit that the FAA is unconstitutional on its face for authorizing surveillance that violates the Fourth Amendment.[5] The claim is curious because, *on*

---

[4] The question of whether a plaintiff asserts a cognizable legal interest is closely related but not identical to the question of whether a plaintiff's particular assertion of a cognizable interest is meritorious. Thus, the concerns detailed in the ensuing discussion, which receive no mention by the panel, cannot be dismissed as pertaining only to "the *merits* of the plaintiffs' claim, rather than . . . their standing." Lynch, J., Op., *ante* at [11 n.8] (emphasis in original).

[5] Insofar as plaintiffs also challenge the FAA on First Amendment grounds, that claim appears to be derivative of the charged Fourth Amendment violation: "The challenged law violates the First Amendment by substantially burdening a broad range of lawful expressive activity *without adequate justification* and by authorizing defendants to acquire constitutionally protected communications *without meaningful judicial oversight*." Compl. ¶ 105 (emphasis added). *See ACLU v. NSA*, 493 F.3d at 657 (Batchelder, J.) (observing that plaintiffs who challenged warrantless NSA surveillance program on various constitutional grounds "have only one claim, namely, breach of privacy, based on a purported violation of the Fourth Amendment or FISA"). This makes sense. Journalists investigating organized crime would hardly be heard to complain that Title III surveillance, lawful under the Fourth Amendment, *see, e.g.*, *United States v. Tortorello*, 480 F.2d 764, 771-75 (2d Cir. 1973), nevertheless violates the First Amendment by burdening their ability to communicate electronically with likely mob targets who could give them insights into La Cosa Nostra, *see generally United States v. Mayer*, 503 F.3d 740, 750 (9th Cir. 2007) (explaining that undercover surveillance lawful under Fourth Amendment does not violate First Amendment rights); *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 471 (D.C. Cir. 1991) (same in context of FISA surveillance);

its face, the FAA makes plain that any surveillance under that statute must be conducted consistent with the Fourth Amendment. This is reflected in no less than three provisions: (1) § 1881a(b)(5), which mandates that FAA surveillance "shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States"; (2) § 1881a(g)(2)(A)(iv), which requires the executive to certify to the Foreign Intelligence Surveillance Court ("FISA court") that the procedures and guidelines it has adopted to satisfy FAA targeting and minimization requirements "are consistent with the requirements of the fourth amendment to the Constitution of the United States"; and (3) § 1881a(i)(3)(A), which conditions the requisite court order on a judicial finding that the executive's targeting and minimization procedures "are consistent . . . with the fourth amendment to the Constitution of the United States." *See* 154 Cong. Rec. S6388 (daily ed. July 8, 2008) (statement of Sen. Bond, then-Vice Chairman, S. Select Comm. on Intelligence) (describing Fourth Amendment compliance as "overarching mandate" of FAA).

In the absence of any evidence of actual surveillance practices under the FAA, a court cannot assume that the executive and the judiciary will flout these statutory requirements or misconstrue Fourth Amendment protec-

---

Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778, 781 n.3 (6th Cir. 1983) (observing that "[c]ourts have recognized that physical surveillance consistent with Fourth Amendment protections in connection with a good faith law enforcement investigation does not violate First Amendment rights" and collecting cases); *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (requiring only that Fourth Amendment be applied with "scrupulous exactitude" where First Amendment interests are implicated in search (internal quotation marks omitted)).

tions. Indeed, the presumption is to the contrary. *See United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *see also Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 618 (2007) (Kennedy, J., concurring) ("Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations."). Thus, how can these plaintiffs claim—in a lawsuit filed the very day the FAA became law—that a statute to which they are not even subject, on its face, puts them at risk of *any* Fourth Amendment injury? *See Lujan v. Defenders of Wildlife*, 504 U.S. at 569 n.4 (requiring standing to be determined "on the facts as they existed when the complaint [was] filed" (internal quotation marks and emphasis omitted)).[6] In the context of such a curious claim, the concerns raised by the panel's decision to lower plaintiffs' constitutional standing burden are heightened by those "prudential principles" whereby the judiciary seeks (1) "to avoid deciding questions of broad social import where no individual rights would be vindicated" and

---

[6] Judge Lynch submits that it is not unusual for facial challenges to be filed on the date of a statute's enactment. *See* Lynch, J., Op., *ante* at [12]. This misses the point. It is certainly unusual to file such a challenge to a statute that, *on its face*, requires compliance with the very constitutional provision that plaintiffs claim will be violated by every application of the law. *See generally Sabri v. United States*, 541 U.S. 600, 609 (2004) (noting that facial challenge "in the strictest sense" is one claiming that "*no* application of the statute could be constitutional" (emphasis added)).

(2) "to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100 (1979); *see Warth v. Seldin*, 422 U.S. at 499 (discussing how prudential concerns supplement constitutional elements of standing).

What individual Fourth Amendment right do plaintiffs seek to vindicate by this facial challenge? The question admits no easy answer. Plaintiffs assert that the FAA "authorizes defendants to acquire the constitutionally protected communications of U.S. citizens and residents"—presumably themselves—without requiring identification of "the people to be surveilled" and the facilities to be monitored in "individualized warrants based on criminal or foreign intelligence probable cause." Compl. ¶ 104. But as United States persons, plaintiffs cannot be "the people to be surveilled" under the FAA; if intercepted at all, it could only be as coincidental communicants of FAA targets. Coincidental interceptees, however, cannot claim a personal Fourth Amendment right to be identified or to have probable cause established *as to themselves* as a precondition to reasonable surveillance. *Cf. United States v. Figueroa*, 757 F.2d 466, 472 (2d Cir. 1985) (holding that Title III "order which does not specify every person whose conversations may be intercepted does not *per se* amount to a 'virtual general warrant' in violation of the fourth amendment" (quoting *United States v. Kahn*, 415 U.S. 143, 154 (1974)); *United States v. Tortorello*, 480 F.2d 764, 775 (2d Cir. 1973) (rejecting argument that government must establish probable cause as to all interceptees: "If probable cause has been shown as to one such participant, the statements of the other partici-

pants may be intercepted if pertinent to the investigation.").

Alternatively, plaintiffs might be understood to challenge the FAA for failing to require individualized warrants, particularity, or probable cause *with respect to foreign targets*. But a non-target's personal right to challenge the lawfulness of surveillance of a third party usually arises only upon the non-target's *actual* interception in the course of such surveillance, which plaintiffs do not allege here. *See generally United States v. Fury*, 554 F.2d 522, 526 (2d Cir. 1977). In any event, because FAA targets must be non-United States persons outside this country, they lack the very Fourth Amendment rights with respect to foreign intelligence surveillance that plaintiffs claim on their behalf. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990) (holding that foreign persons outside the United States cannot claim Fourth Amendment protections); *accord In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157, 168-69 (2d Cir. 2008).[7] This gives rise to a question that plaintiffs do not address and for which no answer can be found either in the panel opinion or Judge Lynch's concurrence: Under what, if any, circumstances can a coincidental interceptee claim a personal Fourth Amendment right to challenge foreign intelligence surveillance that is lawful as to its target? In other contexts in which warrantless interceptions are lawful as to one party, coincidental intercep-

---

[7] Thus, even if plaintiffs' hearsay assertion that their foreign contacts "believed they were more likely to be monitored under the FAA" is "uncontroverted," Lynch, J., Op., *ante* at [11], that belief is irrelevant to identifying the personal constitutional right that plaintiffs seek to vindicate through this action.

tees have not been found to have a distinct Fourth Amendment right. *See generally United States v. White*, 401 U.S. 745, 751-53 (1971) (holding that conversation recorded on consent of one participant did not violate other participant's Fourth Amendment rights).[8]

If, like the district court, the panel had concluded that plaintiffs lacked standing regardless of the nature of their claims because they failed to show actual or imminent injury from FAA interception, there would, of course, have been no need to pursue this matter. But I question how, consistent with "the province of the court . . . to decide on the rights of individuals," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), the panel could recognize plaintiffs' standing without a clearer comprehension of the personal Fourth Amendment right at stake, *see Warth v. Seldin*, 422 U.S. at 500.

Further, without such an understanding, it is impossible to conclude that these plaintiffs are the persons "best suited" to challenge the constitutionality of a statute that cannot target them. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. at 100. Indeed, a contrary inference might be drawn from the fact that, in the FAA, Congress expressly conferred standing on electronic communication service providers to challenge directives requiring them to provide technical assistance to effect authorized surveillance. *See* 50 U.S.C. § 1881a(h)(4). Service providers' willingness to avail themselves of

---

[8] It is no answer to state that "consensual recording is not analogous to non-consensual interception." Lynch, J., Op., *ante* at [11 n.8]. The question, which is only illustrated by *White*, is whether in any circumstance where warrantless interceptions are lawful as to one party, the law recognizes coincidental interceptees to have a distinct Fourth Amendment right to challenge the surveillance.

such standing is evidenced by the Fourth Amendment challenge one such provider filed to surveillance under the FAA's predecessor statute, the Protect America Act of 2007 ("PAA"), Pub. L. No. 110-55, 121 Stat. 552. *See In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act (In re FISA Section 105B Directives)*, 551 F.3d 1004 (FISA Ct. Rev. 2008) (discussed further *infra* at [27-28]). In addition, the law recognizes any person's standing to challenge the legality of FISA-acquired evidence that is offered against him in a criminal prosecution. *See, e.g., United States v. Abu-Jihaad*, 630 F.3d 102, 107-31 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3062 (June 27, 2011); *see also* 50 U.S.C. § 1806(c) (requiring government to notify interceptee of intent to disclose or use information derived from electronic surveillance); *id.* § 1806(e) (permitting interceptee to move to suppress information derived from electronic surveillance as unlawfully acquired); *id.* § 1881e(a) (subjecting information derived from FAA surveillance to provisions of § 1806). Thus, a relaxed inquiry into plaintiffs' standing cannot be justified on the ground that no one else will be able to challenge FAA surveillance. In any event, the Supreme Court has expressly rejected such an argument as a ground for recognizing standing. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (citing *United States v. Richardson*, 418 U.S. 166, 179 (1974)); *accord ACLU v. NSA*, 493 F.3d at 675-76 (Batchelder, J.).

Mindful of the heightened scrutiny and prudential concerns triggered by these particular aspects of plaintiffs' claim, I turn to the even more serious matter of the panel's failure to follow Supreme Court standing precedent.

3. The Panel Decision Puts this Court at Odds with Supreme Court Precedent

Most disturbing about the court's decision not to convene *en banc* is that it thereby allows a novel, reduced standing standard, at odds with Supreme Court precedent, to become citable as the law of this circuit.[9]

To establish standing on summary judgment, plaintiffs were required to demonstrate three elements that constitute the "irreducible constitutional minimum" for standing: (1) an injury in fact, *i.e.*, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a causal connection, *i.e.*, "the injury has to be fairly traceable to the challenged action of the defendant"; and (3) redressability, *i.e.*, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61 (internal citations, quotation marks, and alterations omitted).

The obvious concrete injury to be expected from unlawful electronic surveillance is interception. Plaintiffs, however, offer no evidence that they have ever actually been intercepted by FAA surveillance. Nor have they established that any such interception is "imminent," a

---

[9] Judge Lynch submits that *en banc* review is unnecessary because the panel's "conclusions regarding standing were limited to this statute, these plaintiffs, and the facts of this case." Lynch, J., Op., *ante* at [1]. Would it were so. Standing determinations may be "fact specific," but "standing concepts," *i.e.*, the governing legal principles, gain "considerable definition from developing case law." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Thus, because the flawed "standing concept" developed by the panel in this case might be read to bind future panels, it merits *en banc* review.

term that the Supreme Court construes to mean "*certainly* impending." *Id.* at 564 n.2 (emphasis in original; internal quotation marks omitted); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1152-53 (2009) (refusing to dilute strict imminence requirement to demand only "*realistic* threat that reoccurrence of the challenged activity would cause the plaintiff harm in the reasonably near future" (emphasis in original; internal quotation marks and brackets omitted)).

Instead, plaintiffs profess only a *fear* of FAA interception, which is plainly insufficient to establish standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 107 & n.8 (1983) (holding that subjective fear of police misconduct, even when grounded in past injury, is not enough to demonstrate imminent threat: "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." (emphasis in original)). Rather than follow this precedent to its inevitable conclusion—dismissal of plaintiffs' claim for lack of standing—the panel asserts that it "overstates" the standing standard to require plaintiffs to demonstrate that it is "effectively certain" that they will be intercepted on FAA surveillance. *Amnesty Int'l USA v. Clapper*, 638 F.3d at 135.

How does the panel elide the precise future-injury standard—"*certainly* impending"—articulated in *Lujan*? By reasoning that, in lieu of injury inflicted by the government through actual or imminent FAA interception, plaintiffs can establish standing through self-inflicted injury, specifically, costs incurred to meet with foreign contacts rather than risk feared FAA interception. The panel concludes that with actual injury thus established, the likelihood of interception becomes rele-

vant only to causation, *i.e.*, were the incurred costs "fairly traceable" to the FAA? *Id.* As to this requirement, the panel uses a purported admonition to set a very low bar—"If the possibility of interception is remote or fanciful, [plaintiffs'] present-injury theory fails because [they] would have no reasonable basis for fearing interception under the FAA, and they cannot bootstrap their way into standing by unreasonably incurring costs to avoid a merely speculative or highly unlikely potential harm," *id.* at 133-34—which is then applied to identify a claim for future injury as well. *See* Lynch, J., Op., *ante* at [8] (observing that "the same analysis that supports the conclusion that the plaintiffs' present-injury theory satisfies the causation prong *further* supports the conclusion that the plaintiffs' future-injury theory properly satisfies the injury-in- fact prong" (emphasis in original)).[10]

Thus, for the price of a plane ticket, plaintiffs can transform their standing burden from one requiring a showing of actual or imminent FAA interception to one requiring a showing that their subjective fear of such interception is not "fanciful," "irrational," or "clearly unreasonable." *Id.* at 133, 135. Had the idea only occurred to the plaintiff in *City of Los Angeles v. Lyons*, 461 U.S. 95, he presumably could have avoided the need to show an actual or imminent risk of being subjected to the challenged police chokehold procedure simply by moving from Los Angeles to Glendale, and then claiming that the actual injury of his moving costs was "fairly

---

[10] Judge Livingston's opinion discusses in detail the concerns raised by the panel's identification of standing based on a theory of future injury. *See* Livingston, J., Op., *post* at [4-11].

traceable" to a not-irrational fear of a procedure to which he, after all, had already been subjected.[11]

I doubt that the Supreme Court would have found such an argument convincing in *Lyons* for the same reason it fails to persuade here. Plaintiffs' costs—to the extent any were even demonstrated, *see infra* at [23-24]—are fairly attributed not to the FAA but to their own subjective fear of FAA interception, which they claim has chilled their normal exchange of international communications. The Supreme Court has ruled that such subjective chilling cannot support standing. *See Laird v. Tatum*, 408 U.S. 1, 10 (1972) (holding that plaintiff "who alleges that the exercise of his First Amendment rights is being chilled by the mere exis-

---

[11] Judge Lynch states that Lyons, unlike plaintiffs here, "did *not* have any reasonable expectation" that he would be subjected in the future to the chokehold procedure he sought to enjoin. Lynch, J., Op., *ante* at [14 n.10]. That is Judge Lynch's conclusion, not the Supreme Court's, which found standing lacking not because Lyons' expectations were not "reasonable" but because they were not certain. *See City of Los Angeles v. Lyons*, 461 U.S. at 106 (holding that for Lyons to establish standing he had to allege that he would have another encounter with the police and that "*all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter" (emphasis in original)). This court cannot reduce the "certainly impending" injury requirement for standing to one of reasonableness by pointing to plaintiffs' self-incurred costs. To do so misreads *Lyons* and contravenes the holdings in *Lujan v. Defenders of Wildlife*, 504 U.S. at 564 n.2, and *Summers v. Earth Island Inst.*, 129 S. Ct. at 1152-53. Rather than respond to this and other concerns with how far the panel decision departs from Supreme Court precedent, Judge Lynch dismissively asserts that the dissenters "seem to misunderstand" the panel's "injury analysis." Lynch, J., Op., *ante* at [8]. The wish appears to be father to the thought. I fear we understand the panel's analysis all too well, and recognize that it puts this circuit directly at odds with binding Supreme Court precedent.

tence, without more, of a governmental investigative and data-gathering activity" lacks standing to invoke federal jurisdiction). Applying *Laird* to plaintiffs' case, the district court explained:

> What made the chilling effect subjective in *Laird* was the plaintiffs' failure to show that they were subject to the challenged policy and faced a threat of harm from it. The plaintiffs could only show that the surveillance policy existed. The plaintiffs' failure to substantiate the alleged chill with proof that they really were subject to the information gathering policy made their alleged chill "subjective." *See Ozonoff v. Berzak*, 744 F.2d 224, 229 (1st Cir. 1984) (Breyer, J.) (interpreting phrase "without more" in *Laird* to mean that "[t]he plaintiffs in *Laird* did *not* claim that the information gathering activities were directed against them specifically or that the gathered data could be directly used against them in any foreseeable way"). All of the plaintiffs' alleged "objective" expenditures are insufficient to establish standing because they all arise from the plaintiffs' choices to incur expenditures and costs that are not based on a sufficient showing that the statute in question was directed at them.

Amnesty Int'l USA v. McConnell, 646 F. Supp. 2d at 655. The *Laird* concerns highlighted by the district court—and referenced by then-Judge Breyer in *Ozonoff*—are not allayed by plaintiffs' self-incurred travel costs. As a matter of law, plaintiffs cannot be the targets of FAA surveillance. Thus, whether they incurred costs or not, they cannot show that information gathering activities under the challenged statute will be directed against them. Indeed, the statute provides specific safeguards

to ensure against that possibility, *see* 50 U.S.C. § 1881a(b)-(d), (f)-(g), as well as strict limits on the use of any information coincidentally intercepted from United States persons, *see id.* §§ 1801(h), 1806, 1881a(e), 1881e(a).

To sidestep the adverse standing conclusion dictated by *Laird*, the panel attempts to cabin that Supreme Court decision to its facts and to dismiss as *dictum* any part that might be construed to identify a general rule. *See Amnesty Int'l USA v. Clapper*, 638 F.3d at 146-48. The panel posits that "the *Laird* plaintiffs so obviously lacked standing that the Court did not need to create stricter standing rules in the surveillance context in order to deny plaintiffs standing." *Id.* at 148.[12] I agree that *Laird* did not establish "stricter" standing rules for surveillance cases. But I cannot agree that the Supreme Court was pronouncing mere *dictum* when it identified circumstances where a subjective chilling effect cannot support standing. The Court made this point in distinguishing cases in which standing had been recognized even though the "deterrent, or 'chilling,' effect of governmental regulations [fell] short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. at 11. It stated as follows:

> In none of these cases, . . . did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activi-

---

[12] The panel's first observation would presumably have come as a surprise to the four *Laird* dissenters, especially Justice Douglas, who thought that it was the challenge to, rather than assertion of, plaintiffs' standing that was "too transparent for serious argument." *Laird v. Tatum*, 408 U.S. at 24 (Douglas, J., with Marshall, J., dissenting); *see also id.* at 38 (Brennan, J., with Stewart and Marshall, JJ., dissenting).

> ties or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.

Id. It can perhaps be debated whether the second sentence should be construed as definitional or merely illustrative of circumstances where a chilling effect can establish standing.[13] But what the panel could not do was dismiss the first sentence, which holds that the circumstances there identified *cannot* support standing. Thus, *Laird* compels the conclusion here that plaintiffs lack standing because any chilling of their electronic communications with foreign contacts, including costs incurred in forgoing such communications, arose "merely" from their knowledge of the existence of a program that they feared could target their contacts. *Laird v. Tatum*, 408 U.S. at 11.

In concluding otherwise, the panel not only fails to follow *Lyons* and *Laird*, but also misapplies *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). In that case, the Su-

---

[13] *Compare ACLU v. NSA*, 493 F.3d at 661 (Batchelder, J.) (interpreting *Laird* to require that plaintiff "establish that he or she is regulated, constrained, or compelled directly by the government's actions"), *with id.* at 692 n.3 (Gibbons, J., concurring) (observing that language in *Laird* might be "merely descriptive" of the facts in prior cases in which the Court found standing). In fact, the question need not be decided in this case, as the district court recognized. *See Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d at 654 (noting without deciding question).

preme Court held that plaintiffs who had taken steps to avoid a polluted river had standing to challenge defendants' unlawful discharge of pollutants into the waterway. The panel cites *Laidlaw* as support for its conclusion that "[d]espite not being directly regulated, a plaintiff may establish a cognizable injury in fact by showing that he has altered or ceased conduct as a reasonable response to the challenged statute." *Amnesty Int'l USA v. Clapper*, 638 F.3d at 141. This ignores circumstances critical to the *Laidlaw* decision that are notably absent from this case. In *Laidlaw*, the defendant was then actually discharging pollutants into the river, making plaintiffs' exposure to those pollutants certain if they resumed their abandoned recreational use of the river. It was in these circumstances where, but for plaintiffs' own forbearance, they would unquestionably have been subjected to the injurious conduct, that the Court addressed the "reasonableness" of plaintiffs' avoidance of the river. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. at 184 (concluding that there was "nothing improbable about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms" (internal quotation marks omitted)). In short, *Laidlaw* established a two-step standing inquiry, "requir[ing] that plaintiffs demonstrate that they (1) are *in fact* subject to the defendant's conduct, in the past or future, and (2) have at least a reasonable fear of harm from that conduct." *ACLU v. NSA*, 493 F.3d at 689 (Gibbons, J., concurring) (emphasis added).

Here, plaintiffs' standing claim fails at the first step of the *Laidlaw* analysis. They cannot demonstrate that the executive is certainly conducting FAA surveillance of their foreign contacts, much less that if they resume electronically communicating with these contacts, they will in fact be intercepted. Plaintiffs assert that they reasonably fear such interception, but whether they will ever be subject to it remains a matter of complete conjecture. *See id.* at 656 (Batchelder, J.) (stating with respect to similarly situated plaintiffs that even though their fears of surveillance "may be reasonable, the alternative possibility remains that the NSA might *not* be intercepting, and might *never* actually intercept, any communication by any of the plaintiffs named in this lawsuit" (emphasis in original; footnote omitted)).

For that reason, plaintiffs' situation is more aptly analogized to *Lyons* than to *Laidlaw* in that they claim only "'subjective apprehensions'" that FAA surveillance will "even *take place*." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. at 184 (quoting *Los Angeles v. Lyons*, 461 U.S. at 107 n.8, in distinguishing two cases) (emphasis in *Laidlaw*). The distinction the Supreme Court thus draws between the facts supporting standing in *Laidlaw* and those failing to support standing in *Lyons* must be recognized as "one of kind, not degree," *i.e.*, between subjective apprehension in *Lyons* as to whether challenged governmental conduct would even take place, and the subjective issue in *Laidlaw* as to whether it was reasonable for plaintiffs to fear harm from pollutants that unquestionably were being discharged into the river. *ACLU v. NSA*, 493 F.3d at 690 (Gibbons, J., concurring). In short, what was uncertain about the claimed injury in *Laidlaw* was not defendants' conduct—about which there was no doubt—

but the science of pollution. Likewise, in other "prospective injury" cases cited by the panel, the plaintiffs were found to have standing because they were subject to the conduct challenged, or at least certainly would be subject to it if they took certain actions within their control.[14] Thus, as Judge Gibbons observed, it is error to transform the Supreme Court's holding in *Laidlaw*, "under which the plaintiffs who were *in fact subject to defendant's conduct* had standing because they reasonably feared harm from that conduct, into a much broader proposition, under which plaintiffs may estab-

---

[14] *See, e.g., Davis v. FEC*, 554 U.S. 724, 734 (2008) (recognizing plaintiff candidate's standing to challenge campaign finance scheme where he had already declared his intent to spend in excess of statutory trigger and operation of statute would "shortly burden" his expenditure of personal funds); *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) (recognizing standing to challenge EPA's refusal to regulate greenhouse emissions, resulting in "actual and imminent" injury to state coastal property due to rising sea levels (internal quotation marks omitted)); *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (holding, on motion to dismiss, that complaint adequately alleged facts to show that challenged ordinance "will be enforced against" plaintiffs, but "strongly suggest[ing]" that future litigants "take pains to supplement the record in any manner necessary" to enable court to address standing inquiry "with as much precision as possible"); *Meese v. Keene*, 481 U.S. 465, 473 (1987) (recognizing standing to challenge statute requiring certain films to be labeled as "political propaganda" where statute undoubtedly applied to films plaintiff wished to exhibit); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 73-74 (1978) (recognizing standing to challenge liability limitation for nuclear accidents that encouraged construction of nuclear plants because plaintiffs were exposed to "'immediate' adverse effects," including undisputed low-level radiation emissions); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 (1973) (holding, on motion to dismiss, that plaintiffs adequately alleged standing to challenge rail surcharge because if facts alleged were proved true, plaintiffs would be "squarely among those persons injured").

lish standing by showing merely that they possess a reasonable *fear of being subject to defendant's allegedly harmful conduct*." *Id.* at 689 (emphasis in original). This court needs to say so *en banc*.

4. The Factual Record Fails To Satisfy Even the Panel's Reduced Standing Standard

After pronouncing a reduced standing standard at odds with Supreme Court precedent, the panel allows plaintiffs to satisfy that standard on a negligible factual record. The panel identifies *actual* present injury based on plaintiffs' sworn assertions that "it has become more difficult and expensive to practice their professions as a result of the enactment of the FAA." Lynch, J., Op., *ante* at [9 n.6]; *see Amnesty Int'l USA v. Clapper*, 638 F.3d at 133. It is no coincidence that the panel summarizes the assertions referenced. A review of the declarations submitted by plaintiffs reveals them to be notably lacking in the requisite "specific facts." *Lujan v. Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted).[15]

---

[15] The "certainty and specificity" requirements for standing are not demanded by this judge, as Judge Lynch suggests, *see* Lynch, J., Op., *ante* at [13 n.9], but by binding Supreme Court precedent. To the extent Judge Lynch submits that it is impossible for plaintiffs to satisfy that standard with respect to their actual interception under a classified surveillance scheme, that does not permit the panel to relieve plaintiffs of the standing burden established by this precedent. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. at 227; *ACLU v. NSA*, 493 F.3d at 675-76 (Batchelder, J.); *see also* Livingston, J., Op., *post* at [11]. In any event, Judge Lynch does not—and cannot—use that argument to excuse plaintiffs' failure to adduce "specific facts" to support the self-incurred costs prong of even the panel's reduced standing standard, a matter wholly within plaintiffs' personal knowledge.

Two declarants conclusorily report only that they "will have to travel" at unspecified future times to avoid FAA interception of their conversations with foreign sources. *See* Mariner Decl. ¶ 10 (stating that, as a result of FAA, "I will have to travel abroad to gather information that I would otherwise have gathered by telephone or e-mail"); Klein Decl. ¶ 9 (stating that, as a result of FAA, "I will have to travel to gather information that I previously might have gathered by telephone or e-mail"). Two other declarants imply actual travel without providing any particulars. *See* Hedges Decl. ¶ 9 (reporting that FAA "has made my work very difficult and often requires me to travel to see those who have information" and that "[t]he financial cost and time required to speak with many of my contacts is now immense"); McKay Decl. ¶¶ 8, 10 (stating that, after FAA was enacted, "[w]henever possible," declarant and law partner "collect information in person rather than by telephone or email . . . [which] requires travel that is both time-consuming and expensive"). Finally, one declarant who resides in Washington, D.C., asserts that, "[m]ost recently," she traveled "to New York City to meet with" a French barrister to discuss her representation of a Guantanamo Bay detainee. Royce Decl. ¶ 7. Assuming that the declarant incurred costs for this trip—a fact not specifically asserted—those costs cannot constitute FAA injury because the statute would not have permitted interception of electronic communications with a French national who was in New York. *See* 50 U.S.C. § 1881a(b)(1) (precluding targeting of any person known to be in United States).

Thus, while the panel's identification of self-incurred costs as the actual present injury in this case is legally unsupportable for reasons discussed in the previous sec-

tion of this opinion, it also lacks the requisite foundation in "specific facts," even without considering the "much more" convincing factual showing required of a non-target. *Lujan v. Defenders of Wildlife*, 504 U.S. at 561-62.[16]

The panel further concludes that, whether as a matter of causation or actual future injury, plaintiffs demonstrate a reasonable, *i.e.*, not "fanciful," "irrational," or "clearly unreasonable," fear of FAA interception because their fear is "based on a reasonable interpretation of the challenged statute and a realistic understanding of the world." *Amnesty Int'l USA v. Clapper*, 638 F.3d at 139. But how reasonable can it be to interpret the FAA—a statute that, on its face, requires all interceptions conducted thereunder to be consistent with the Fourth Amendment—to authorize, on its face, interceptions that invariably will violate that amendment? And what is the basis for plaintiffs' "realistic view of the world" of foreign intelligence surveillance, particularly with respect to the executive's classified targeting priorities and practices? Plaintiffs do not—and indeed cannot—profess personal knowledge of such matters. Thus, their identification of foreign contacts as "likely" targets

---

[16] Judge Lynch does not acknowledge this concern, relegating it to a *see also* cite respecting a different point made by Chief Judge Jacobs. *See* Lynch, J., Op., *ante* at [2]. The concern here identified, however, is not one of panel credulity, declarant veracity, or party collusion—the straw men with whom Judge Lynch chooses to joust. *See id.* at [2-4]. The question is *sufficiency*. In short, even if the declarants are presumed truthful, how do their conclusory assertions of incurred costs and speculative predictions as to future costs satisfy the "specific facts" requirement for standing established in *Lujan v. Defenders of Wildlife*, 504 U.S. at 561? No answer to that question can be found either in the panel's opinion or Judge Lynch's concurrence.

for FAA interception, *id.* at 126, is completely speculative and not admissible evidence, *see* Fed. R. Evid. 602; Fed. R. Civ. P. 56(c)(4).[17]

To justify its reliance on these and other similarly unsubstantiated or conclusory assertions by plaintiffs, the panel observes that the government did not object. *See, e.g., Amnesty Int'l USA v. Clapper*, 638 F.3d at 127 n.10, 129 & n.13, 133. But the panel could not relieve these non-target plaintiffs of their particularly heavy evidentiary burden, nor could it forgo its own duty to conduct a rigorous inquiry into plaintiffs' standing simply by noting the government's supposed failure to object. *See Summers v. Earth Island Inst.*, 129 S. Ct. at 1152-53 (rejecting dissent view that an assertion that "no one denies" must be accepted as established in evaluating standing). The panel was under an "independent

---

[17] Judge Lynch submits that it is hardly speculative to think that the government will seek to surveil plaintiffs' overseas contacts such as "alleged Al Qaeda members (and Guantanamo detainees) Khalid Sheik Mohammed and Mohammedou Ould Salahi, as well as those men's families." Lynch, J., Op., *ante* at [13]. What is speculative, however, is that these persons will be surveilled *under the FAA*. The electronic communications of persons in federal custody are routinely surveilled on a theory of implied consent based on notice. *See United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987). Moreover, alleged al Qaeda members and their families are such obvious targets for FISA or NSA surveillance that one can only speculate that the executive would instead use the FAA to monitor their electronic communications. *See ACLU v. NSA*, 493 F.3d at 671 (Batchelder, J.) (finding it "reasonable" that FISA Court would authorize interception of communications involving al Qaeda affiliates targeted under challenged NSA surveillance program). To the extent the real issue here is the possibility of dragnet surveillance, *see* Lynch, J., Op., *ante* at [7 n.4], the interception of plaintiffs' contacts—or plaintiffs themselves—pursuant to the FAA is completely speculative for reasons discussed in Parts 5 and 6 of this opinion.

obligation" to assess plaintiffs' standing, even if the government did not call it into question at all. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. at 1454.

In fact, a glimpse into the actual world of foreign intelligence targeting is afforded by unredacted portions of the FISA Court of Review's opinion in *In re FISA Section 105B Directives*, 551 F.3d 1004, and that world appears quite different from the one hypothesized by plaintiffs. That case presented an as-applied challenge to now-expired amendments to FISA effected through the PAA, which allowed the executive "to conduct warrantless foreign intelligence surveillance on targets (including United States persons) reasonably believed to be located outside the United States," subject to specified criteria, including the adoption of targeting and minimization procedures akin to those now required by the FAA, but with no prior court review. *Id.* at 1006-07 (internal quotation marks omitted). After holding that foreign intelligence surveillance is not subject to the Fourth Amendment warrant requirement, *see id.* at 1012, the court addressed a Fourth Amendment reasonableness challenge based on the PAA's failure to require particularity, judicial review of probable cause, or adequate proxies for these omitted protections, *see id.* at 1013. Before rejecting the claim, the court reviewed the actual procedures adopted by the executive to satisfy PAA requirements and found that they in fact afforded "protections above and beyond those specified" in the statute, *id.* at 1007, and adequately allayed any particularity or probable cause concerns, *see id.* at 1013-14 & n.7 (specifically noting that procedures adopted by executive to comply with PAA incorporated executive order that required Attorney General to determine in each case, based on information provided pursuant to Depart-

ment of Defense regulations, that probable cause existed to believe that targeted person is foreign power or agent of foreign power). Such scrupulous oversight rebuts any general assumptions, unsupported by specific facts, that the executive will instinctively abuse its targeting discretion under the FAA—a statute that goes further than the PAA in subjecting executive targeting and minimization procedures to judicial review and in conditioning court orders on a specific finding that the procedures are "consistent . . . with the fourth amendment." 50 U.S.C. § 1881a(i)(3)(A). Further, it reinforces the need for this court to clarify *en banc* that, consistent with Supreme Court precedent, plaintiffs' standing depends on their showing actual or imminent FAA interception.

5. The Panel Decision Creates a Circuit Split

The most obvious reason why plaintiffs cannot show that they are subject to actual or imminent FAA interception is because that statute does not *direct* that any foreign intelligence surveillance be conducted; it merely *authorizes* the executive to undertake such surveillance pursuant to specified statutory requirements and protections. This is not to suggest that the executive will not exercise FAA authority. I assume that it will. I further assume that the FAA authorizes dragnet surveillance. Nevertheless, neither plaintiffs nor this court can know the extent to which the executive will seek or the FISA court authorize the exercise of such surveillance authority. That is the point Judge Lynch ignores in his mistaken identification of a "palpable" contradiction between the preceding two sentences and any concern with plaintiffs' standing. Lynch, J., Op., *ante* at [13 n.9]. In fact, any decisions to seek or grant FAA surveillance authority depend, among other things, on national secu-

rity priorities, available resources, alternative means of surveillance, and, of course, Congress's mandate that all FAA surveillance be conducted in compliance with the Fourth Amendment. In these variable circumstances, plaintiffs cannot show that their foreign contacts are certain to be targeted for *FAA* surveillance. Much less can they show that their own FAA interception is certainly impending. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 564 n.2. Rather, they can only speculate.

Those of our sister circuits to have confronted challenges to other programs authorizing, but not directing, intelligence surveillance have uniformly found that plaintiffs lacked standing precisely because they could not demonstrate actual or imminent interception under such schemes. *See United Presbyterian Church v. Reagan*, 738 F.2d at 1380 (Scalia, J.) (stating that even if plaintiffs may be "at greater risk than the public at large" to being targeted for surveillance, such risk falls "far short of the 'genuine threat'" of harm required to support standing); *accord Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d at 1205 (holding that despite plaintiff's formal designation as "global terrorist" organization subject to NSA surveillance, threat of such surveillance was too speculative to support standing);[18] *ACLU v. NSA*, 493 F.3d at 667 (Batchelder, J.) (holding that plaintiffs who adduced no evidence that NSA "actually intercepted (or will actually intercept) any of their

---

[18] In *Al-Haramain*, the inadvertent disclosure of a classified document indicated that the plaintiffs had in fact been intercepted by NSA surveillance. Nevertheless, because the document was protected by the state secrets privilege, the court concluded that plaintiffs lacked standing because they failed to point to any admissible evidence that their fear of interception was more than conjectural. *See Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d at 1205.

conversations" could not rely on "a *possibility*" of future interception to establish standing (emphasis in original)); *id.* at 689 n.2 (Gibbons, J., concurring) (distinguishing between persons demonstrably subject to challenged policy, and persons who merely fear that policy may be enforced against them, in concluding that plaintiffs lacked standing to challenge warrantless NSA surveillance program that might target persons with whom they regularly communicated).

The panel dismisses these cases as not binding on this court. *See Amnesty Int'l USA v. Clapper*, 638 F.3d at 149. True enough, but the fact remains: their reasoning comports with the Supreme Court's holdings in *Lyons*, *Laird*, and *Laidlaw*, whereas the panel's does not.[19]

---

[19] Judge Lynch attempts further to distinguish these cases factually, asserting that *United Presbyterian Church* presents a broader challenge than this case, *see* Lynch, J., Op., *ante* at [14-15] (contrasting challenge to constitutionality of entire national intelligence gathering system in that case with challenge to specific statute in this case), and *ACLU v. NSA* a narrower one, *see id.* at [15] (contrasting challenge to NSA warrantless surveillance program targeting persons associated with al Qaeda in that case with challenge to statute that permits dragnet surveillance here). He does not explain, however, how these differences make it easier for these plaintiffs to establish standing.

Judge Lynch also submits that the injury at issue in *United Presbyterian Church* was limited to subjective chilling, whereas the plaintiffs here "suffered concrete harms—including the expenditure of funds." *Id.* at [14-15]. In fact, the plaintiffs in *United Presbyterian Church* alleged past surveillance *plus* subjective chilling. *See United Presbyterian Church v. Reagan*, 738 F.2d at 1380 ("The third kind of harm appellants allege is that some of them have been or are currently subjected to unlawful surveillance."). Plaintiffs here do not claim any past FAA surveillance. No matter. The facts alleged in *United Presbyterian Church* cannot satisfy standing under the rules enunciated in *City of Los Angeles v. Lyons*, 461 U.S. at 107 & n.8, and *Laird v. Tatum*, 408 U.S. at 10-11. And for the reasons discussed, *see supra* Part 3, no dif-

The court should convene *en banc* to eliminate the unnecessary circuit split created by the panel decision.

6. Statutory "Gates" to FAA Interception, Including Judicial Review, Make Plaintiffs' Interception Particularly Speculative

Plaintiffs' standing burden is, in fact, heavier in this case than in those confronting our sister circuits. In each of those cases, the challenged programs involved intelligence surveillance conducted under executive authority without congressional authorization or judicial review. By contrast, the powers of all three branches of the federal government are united to support FAA sur-

---

ferent conclusion is warranted by plaintiffs' purported expenditures to avoid feared FAA interception when *Lyons* and *Laird* are properly construed consistent with *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. at 184.

Judge Lynch states that in *ACLU v. NSA*, "the government argued that it would not be able to address the question of standing without disclosing state secrets," whereas here, the government did not invoke the state secrets privilege. Lynch, J., Op., *ante* at [15]. As I read *ACLU v. NSA*, the government invoked the state secrets privilege not for the reason stated by Judge Lynch, but "to bar the discovery or admission of evidence" by plaintiffs of evidence that might compromise national security. *ACLU v. NSA*, 493 F.3d at 650 (Batchelder, J.). In short, the government's argument was not that *it* could not address standing without the disclosure of this evidence, but that "without the privileged information, none of the named plaintiffs could establish standing." *Id.* Deciding the case "solely on the publicly available information that was admitted by the district court and made a part of its record," *id.* at 650 n.3, the Sixth Circuit concluded that the plaintiffs failed to establish standing under the principles established in *Lyons*, *Laird*, and *Laidlaw*. Thus, raising the specter of the state secrets privilege in this case is a red herring. The plaintiffs, who never sought any discovery that was denied under that privilege, simply do not demonstrate standing under binding Supreme Court precedent.

veillance. *See United States v. Abu-Jihaad*, 630 F.3d at 121 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring)). More to the point for purposes of standing, when Congress authorized FAA surveillance, it erected a number of statutory "gates" through which the executive must pass before it can intercept any communications. At each gate, the sphere of possible interceptions can be narrowed, whether by limitations on targeting, minimization requirements, judicial review, or a Fourth Amendment mandate. Thus, to demonstrate that they are subject to actual or imminent FAA surveillance, plaintiffs must show not only that it is certain that the executive will target their foreign contacts—which plaintiffs cannot do—but also that interception of these particular contacts (and, coincidentally, plaintiffs themselves) is certain to take place despite required targeting limits, minimization, judicial review, and the statute's overarching Fourth Amendment mandate.

The decision in *In re FISA Section 105B Directives*, 551 F.3d at 1013-14 & n.7, demonstrates why plaintiffs cannot show that their interception is certain notwithstanding the targeting and minimization procedures required by the FAA. As for judicial review, the panel's dismissal of that intermediate step notably fails to mention the FISA court's obligation to make an independent Fourth Amendment finding before issuing any FAA order. Instead, the panel implies that FISA court judges will simply rubber stamp FAA surveillance applications and, in support, cites empirical evidence showing that, in 2008, FISA court judges approved 2,081 of 2,082 surveillance applications. *See Amnesty Int'l USA v. Clapper*, 638 F.3d at 140 (acknowledging that evidence does not indicate "how many of these applications, if any,

came after the FAA was enacted on July 10, 2008"). I respectfully disagree. The statistics merit little consideration; they could just as easily reflect the executive's scrupulous compliance with statutory requirements before submitting applications for judicial review. *See generally In re FISA Section 105B Directives*, 551 F.3d at 1007 (recognizing that executive was more protective than PAA required in conducting warrantless surveillance under that statute).

More important, the panel fails to tell the whole story when it states that the FISA court "must" order FAA surveillance if the executive's certification "conforms to the statutory requirements." *Amnesty Int'l USA v. Clapper*, 638 F.3d at 139. To be sure, the FISA court must find that the executive's certification "contains all the required elements." 50 U.S.C. § 1881a(i)(3)(A). But it must further find for itself that the executive's targeting and minimization procedures conform to all statutory requirements *and* are consistent "with the fourth amendment." *Id.* Far from cabining judicial review, this provision was intended to "ensur[e] FISA Court involvement in any aspect of the new procedure for targeting foreigners outside the United States that could involve U.S. persons." 154 Cong. Rec. S6181 (daily ed. June 26, 2008) (statement of Sen. Rockefeller, then-Chairman, S. Select Comm. on Intelligence); *see also* 154 Cong. Rec. S6389 (daily ed. July 8, 2008) (sectional analysis of FAA presented by Sen. Bond) (explaining that if FISA court determines that targeting and minimization procedures are inconsistent with FAA's requirements or Fourth Amendment, then it "shall order the Government, at its election, to correct

any deficiencies or cease, or not begin, the acquisition").[20]

There is no reason to think that the Article III judges who serve on the FISA court will be timid in exercising this review authority. Well before the FAA was enacted, the FISA Court of Review ruled that FISA court judges were authorized to scrutinize government applications, including "certifications," and to seek more information as warranted to ensure compliance with statutory requirements. *In re Sealed Case*, 310 F.3d 717, 735-36 (FISA Ct. Rev. 2002). Thus, they can be expected to do the same in conducting the constitutional review mandated by the FAA. *See generally In re FISA Section 105B Directives*, 551 F.3d at 1008 (noting that, in reviewing constitutional challenge to PAA, FISA court "handed down a meticulous opinion").[21]

---

[20] Judge Lynch persists in minimizing the FAA's Fourth Amendment mandate by stating that the FISA court determines only if "the government's *general procedures*" satisfy the Fourth Amendment. Lynch, J., Op., *ante* at [5-6] (emphasis in original). Those "general procedures," however, pertain to targeting, *i.e.*, identifying who will be intercepted, and minimization, *i.e.*, deciding what can be intercepted, surely core Fourth Amendment concerns. Further, the statute's Fourth Amendment requirement applies generally to the conduct of FAA surveillance, *see* 50 U.S.C. § 1881a(b)(5), which makes it more difficult to cabin as Judge Lynch suggests.

[21] The FISA court's decision in *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01, slip op. (FISA Ct. Aug. 27, 2008), cited by plaintiffs in their brief on appeal, is not to the contrary. The court there adopted the ACLU's characterization of the court's role in FAA proceedings as "narrowly circumscribed," *id.* at 3 (internal quotation marks omitted), only to explain that its statutory obligation is to review the executive's certification, targeting, and minimization procedures, not to conduct "a facial review" of the FAA's constitutionality, *id.* at 9-10. The court specifically

In sum, plaintiffs fail to establish standing because they can only speculate that they will ever be intercepted by FAA surveillance.

7. Plaintiffs Fail to Demonstrate Redressabilty

Having recast the standing standard to allow plaintiffs to carry their injury burden by reference to self-incurred costs, and their causation burden by demonstration of a not-irrational fear of FAA interception, the panel addressed the final constitutional requirement, redressability, in a footnote. Acknowledging that the element had received little attention from the district court or the parties, the panel nevertheless found it satisfied, explaining that plaintiffs' injuries, *i.e.*, their costs, stemmed from a reasonable fear of FAA interception "and if a court grants their requested relief—an injunction prohibiting the government from conducting surveillance under the FAA—the feared surveillance would no longer be permitted and therefore would, presumably, no longer be carried out." *Amnesty Int'l USA v. Clapper*, 638 F.3d at 140 n.24. The requirement cannot be dismissed so easily.

To demonstrate redressability, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted); *accord Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. at 181. Under the panel's analysis, the relevant injury is not FAA interception, but plaintiffs' professional costs. Thus, to carry

---

acknowledged, however, that for any FAA application, it "must decide whether the targeting and minimization procedures are consistent with the Fourth Amendment." *Id.* at 9 (citing 50 U.S.C. § 1881a(i)(3)(A)).

their burden on redressability, plaintiffs had to adduce evidence that enjoining FAA surveillance would relieve them of the need to incur such costs. Such a conclusion cannot withstand scrutiny.

Plaintiffs' theory of standing is predicated on the assertion that their foreign contacts are "likely" to be targeted for FAA surveillance because they are "people the U.S. government believes or believed to be associated with terrorist organizations, political and human rights activists who oppose governments that are supported economically or militarily by the U.S. government, and people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts." *Amnesty Int'l USA v. Clapper*, 638 F.3d at 127 (internal quotation marks omitted). But if the United States intelligence community is as inclined to monitor such persons' communications as plaintiffs assert, then enjoining the FAA will merely eliminate one of several means for achieving that objective. It will not shield plaintiffs or their contacts from the universe of alternative electronic surveillance options available to the government. After FISA's original enactment, warrantless radio surveillance of international communications carried by satellite and wire surveillance of international communications performed on foreign soil or offshore continued to be conducted outside that statutory regime, as long as United States persons located in this country were not specifically targeted.[22]

---

[22] The Supreme Court has never ruled that foreign intelligence surveillance must be conducted pursuant to court order. *See United States v. Abu-Jihaad*, 630 F.3d at 121 (noting that question remains unresolved by Supreme Court). Rather, Congress has required, and the

executive has agreed, that some foreign intelligence surveillance will be so conducted as specified in FISA and various amendments thereto, such as the FAA. *See id.* (recognizing that when executive conducts foreign intelligence surveillance pursuant to statutory authority and court order, the whole of federal authority unites in defining such activity as reasonable search).

While FISA provides the "exclusive means" for conducting "electronic surveillance" as that term is defined in that statute, 18 U.S.C. § 2511(2)(f), this does not mean that foreign intelligence surveillance not authorized by FISA is proscribed, an inference that might mistakenly be drawn from the panel's observation that "[t]he FAA was passed specifically to permit surveillance that was not permitted by FISA but that was believed necessary to protect the national security," *Amnesty Int'l USA v. Clapper*, 638 F.3d at 138. Indeed, Judge Lynch only adds to the confusion when he states that "the FAA indisputably and significantly broadens the risk of interception, lowers the government's probable-cause burden, and decreases the oversight role" of the FISA court. Lynch, J., Op., *ante* at [4]. The statement rests on an assumption that is not the case: that all surveillance now covered by the FAA was previously covered by FISA.

In fact, FISA's history shows that Congress specifically chose not to subject all foreign intelligence surveillance to that law. *See, e.g.*, S. Rep. No. 95-701, at 34 (1978) (explaining that FISA warrant requirement "does not apply to the acquisition of the contents of international or foreign communications, where the contents are not acquired by intentionally targeting a particular known U.S. person who is in the United States"); *id.* at 71 (stating that FISA "does not deal with international signals intelligence activities as currently engaged in by the [NSA] and electronic surveillance conducted outside the United States"). Nor did Congress extend FISA to all foreign intelligence surveillance in which a United States person might coincidentally be intercepted. *See, e.g., Foreign Intelligence Electronic Surveillance: Hearing Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 95th Cong., 2d Sess., at 172 (Jan. 10, 1978) (statement of Sen. Kennedy) (stating that "targeted sweeps" aimed at known United States persons in this country would be covered by FISA, but "nontargeted sweeps" by the NSA "would not be covered").

Some thirty years later, in hearings leading to the enactment of the FAA, the Directors of National Intelligence and the Central Intelligence Agency ("CIA") explained why technological assumptions informing FISA had become outmoded and created confusion as to what foreign intelligence surveillance did and did not fall within that law's parameters. *See, e.g., Modernization of the Foreign Intelligence Surveillance Act: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong., 1st Sess., at 19 (May 1, 2007) (statement of Adm. J. Michael McConnell, Director of National Intelligence) ("Legislators in 1978 could not have been expected to predict an integrated global communications grid that makes geography an increasingly irrelevant factor. Today, a single communication can transit the world even if the two people communicating are only located a few miles apart. And yet simply because our law has not kept pace with technology, communications intended to be excluded from FISA are in fact included."); *FISA for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., 2d Sess., at 9 (July 26, 2006) (statement of Gen. Michael Hayden, Director, CIA and former Director, NSA) (observing that "NSA may have multiple opportunities to intercept [a communication] as it moves and as it changes medium" and that "[a]s long as a communication is otherwise lawfully targeted, I believe we should be indifferent to where the intercept is achieved").

In response to these concerns, the FAA authorizes the executive, upon FISA court order, to secure from electronic communication service providers assistance to acquire foreign intelligence information from non-United States persons located outside this country. Contrary to the panel's characterization, the FAA does not authorize conduct that Congress intended to proscribe in FISA. Rather, it subjects some foreign intelligence surveillance that previously may have been conducted pursuant to executive order to new statutory limitations, including judicial review. At the same time, it clarifies that some foreign intelligence surveillance that might have been thought to fall within FISA's original terms should instead be conducted pursuant to the requirements and protections outlined in the FAA. *See generally United States v. Abu-Jihaad*, 630 F.3d at 121-22 ("[T]he Constitution's warrant requirement is flexible, so that different standards may be compatible with the Fourth Amendment in light of the different purposes and practical considerations at issue." (internal quotation marks omitted)). It is in this context that I question whether plaintiffs' profession that they have

Thus, even if FAA surveillance were enjoined, the government could still conduct surveillance by other means, such as FISA-exempt NSA surveillance programs or, in certain cases, FISA itself. Whether or not these alternatives would be more difficult or time-consuming is not the point. The critical fact is that plaintiffs would not know whether such alternative surveillance was being conducted with respect to contacts whom plaintiffs assert are of obvious foreign intelligence interest. *See generally ACLU v. NSA*, 493 F.3d at 671 (Batchelder, J.) (concluding that enjoining NSA warrantless surveillance of terrorists and their affiliates would not redress plaintiffs' fears of interception because of likelihood that FISA court would authorize such interceptions). Moreover, the United States is hardly the only government conducting electronic surveillance. Even without the FAA, then, plaintiffs would confront a real possibility that their foreign contacts, particularly those believed to be associated with terrorist organizations or opposed to established governments, would be prime targets for surveillance by other countries, including their own.[23] Thus, neither their fear of interception nor their need to incur costs to avoid such interception would be redressed by enjoining FAA surveillance.

Apparently, the government made this point at oral argument on appeal. *See Amnesty Int'l USA v. Clapper*, 638 F.3d at 129 n.13 (observing that "government pro-

---

greater reason to fear interception after the FAA's enactment than before can withstand the required rigorous scrutiny.

[23] *See, e.g.*, Walsh Decl. ¶ 11 (acknowledging that Cuban contacts "believe that their calls could be monitored by the Cuban government," which makes them disinclined to speak about Cuban policy, but willing to speak—presumably critically—about U.S. policy).

fessed itself 'puzzled' as to why the plaintiffs had not been just as nervous about being monitored before the FAA was enacted as they are now"). The panel, however, concluded that the government could not question the genuineness of plaintiffs' assertions as to the impact of the FAA on their work because it had failed to submit contrary evidence or to seek a hearing in the district court. *See id.* I am not convinced. A standing determination is not a debate round, where an unchallenged point, however unsubstantiated, is scored for its proponent. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. at 581 (Kennedy, J., concurring) (observing that standing requirements ensure that "legal questions . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action" (internal quotation marks omitted)). Rather, as earlier noted, a federal court is under an "independent obligation to consider standing, even when the parties do not call it into question." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. at 1454; *see Summers v. Earth Island Inst.*, 129 S. Ct. at 1152. That obligation requires an especially rigorous inquiry into self-serving assertions unsupported by specific facts. Indeed, the obligation applies with particular force where, as here, the injury to be redressed is self-inflicted, making it appropriate to consider whether, if the fear is genuine, it would persist even if the relief sought were granted.

The concerns raised by the panel's redressability analysis only reinforce the need to review this case *en banc*. I emphasize, however, that such review, if conducted in accordance with established Supreme Court precedent, would never reach the issue of redressability.

Plaintiffs' standing claim fails at the injury step of analysis because they have not demonstrated that they are subject to actual or imminent FAA interception.

* * *

To summarize, this case demands *en banc* review because the panel's recognition of plaintiffs' standing based on costs incurred to avoid a not-irrational fear of FAA interception effectively establishes a novel, reduced standing standard that

(1) cannot be substituted for the "especially rigorous" inquiry required when a party challenges an act of Congress that cannot target him;

(2) fails to address prudential concerns raised by plaintiffs' articulation of their Fourth Amendment claim;

(3) cannot be reconciled with Supreme Court precedent (a) rejecting subjective fear as a basis for standing, and (b) recognizing standing based on forbearance action only when, but for his forbearance, a plaintiff would certainly be subject to the challenged conduct;

(4) is not, in any event, supported by "substantial facts" in this case;

(5) creates a split between this court and three of our sister circuits in analyzing standing to challenge foreign intelligence surveillance programs;

(6) misconstrues the FAA in dismissing various intervening steps that preclude plaintiffs from demonstrating that they are subject to actual or imminent interception under that statute; and

(7) assumes redressability without rigorous inquiry or substantial facts.

Insofar as the court today denies rehearing *en banc*, it is not the six judges who dissent from that decision who "close" any courthouse doors. Lynch, J., Op., *ante* at [17]. Rather, it is our remaining colleagues who decline to consider whether a questionable standing standard should become the law of this circuit. There is, however, another courthouse, and those of us here in dissent can only hope that its doors will be opened for further discussion of this case.

DEBRA ANN LIVINGSTON, *Circuit Judge*, with whom Chief Judge JACOBS, Judge CABRANES, Judge RAGGI, and Judge WESLEY join, dissenting from the denial of rehearing *en banc*:

I join fully in Judge Raggi's scholarly opinion dissenting from the denial of rehearing *en banc*. I write separately only to address the degree to which the panel's opinion, in frank disregard of clear Supreme Court authority, threatens a *sub silentio* transformation of this Circuit's case law regarding so-called "probabilistic harm"—meaning, the narrow circumstances in which this Court has recognized injury in fact to exist based on the risk of some future harm.

The Supreme Court has repeatedly instructed that injury in fact must be actual or imminent to afford Article III standing to a would-be plaintiff. Thus, in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Court, summarizing its case law, stated flatly that threatened injuries must be "certainly impending" to constitute injury in fact: "[W]e have said many times before and reiterate today: Allegations of possible future injury do not satisfy the requirements of Art[icle] III." *Id.* at 158.

Only two Terms ago, the Court affirmed that even the *statistical probability* of future harm is not enough: standing, the Court said, "'is not "an ingenious academic exercise in the conceivable" . . . [but] requires . . . a factual showing of perceptible harm.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1152 (2009) (alteration in original) (omissions in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992)).

Despite such repeated admonitions, the panel concluded that the plaintiffs established standing based on their alleged fear of future surveillance because there is an "objectively reasonable likelihood" that plaintiffs' communications will, at some point, be monitored. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 134 (2d Cir. 2011). Even assuming such a likelihood (which, in fact, has not been shown), the panel did not explain its disregard of the Supreme Court's requirement that injury must be actual or imminently threatened, *see, e.g., Summers*, 129 S. Ct. at 1148, nor did it justify its attempt at expansion of the limited circumstances in which this Circuit has found injury in fact to be present based on a risk of future harm.

Judge Lynch, in his opinion concurring in the denial of en banc review, answers this charge with a simple, "Not so." He then cites to the plaintiffs' supposed *present* injury—the costs they allegedly incurred as a result of their fear of surveillance—in an effort to substantiate his point. Lynch, J., Op. Concurring in Denial of Reh'g En Banc 10 n.6. But the plaintiffs here relied on *two* asserted injuries in their bid for standing—not only on their present costs, but also on their asserted fear of future surveillance. The panel opinion addresses both. With regard specifically to the *future* injury, more-

over—meaning, the plaintiffs' claimed fear of surveillance pursuant to the FISA Amendments Act of 2008 ("FAA") at some future point—the panel opinion concludes, remarkably, as follows:

> To determine whether the plaintiffs have standing under their future-injury theory, we would need to determine whether the FAA creates an *objectively reasonable likelihood* that the plaintiffs' communications are being or will be monitored under the FAA. As noted above, we conclude that the future injuries alleged by the plaintiffs are indeed sufficiently likely [to occur] to confer standing under the test established in the case law for basing standing on the risk of future harm.

638 F.3d at 134 (emphasis added). With respect, this simply ignores the Supreme Court's admonition that "[a]llegations of possible future injury do not satisfy the requirements of Art[icle] III." *Whitmore*, 495 U.S. at 158. Neither the panel opinion nor Judge Lynch's concurrence, moreover, offers any refutation of the analysis here, nor even a word of justification for this wholesale broadening of the narrow circumstances in which this Circuit has found injury in fact to be present based on a risk of future harm.

Having proffered only a token response to the serious questions that his standing analysis raises, Judge Lynch concludes his concurrence by suggesting that anyone who disagrees with the panel's novel approach to standing seeks without warrant "to close the courthouse doors." Lynch, J., Op., *ante* at 18-19. This charge is perhaps ironic, given that six members of this Court—a full half of its active judges—have vigorously sought to open those doors to a more careful examination of the

panel's startling standing conclusions but have been thwarted in this effort, and despite the universally acknowledged "exceptional importance" of the issue presented.

Again with due respect, the Constitution sets limits not only on the power of Congress, as Judge Lynch's concurrence affirms, but also on that of judges. It is thus not the "glory of our system," as the concurrence would have it, *see* Lynch, J., Op., *ante* at 18, that elected leaders must answer to unelected judges whenever a challenge is asserted. Article III of the Constitution instead limits the judicial power "to redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Summers*, 129 S. Ct. at 1148. As the Supreme Court said only two Terms ago, "[e]xcept when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action." *Id.*

In concluding, without explanation, that injury in fact has been established here based on a mere "reasonable likelihood" that the plaintiffs might one day be surveilled, the panel opinion in this matter provokes a reasonable fear, but not of an obstinate closure of courthouse doors. The fear, instead, is of judges arrogating to themselves a power inconsistent with both our constitutional design and the role of courts in a democratic society. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). The panel's wholesale (if unacknowledged) disavowal of Supreme Court precedent in its assessment of the plaintiffs' "future injury" claim thus represents a further basis—in addition to the many identified by Judge Raggi in her thorough and thoughtful opinion—for *en banc* review.

* * *

As Judge Raggi's dissent points out, the panel's conclusion that the plaintiffs have established standing was based in part on an alleged "present injury"—their self-inflicted costs purportedly incurred as a result of a claimed fear of surveillance under the FAA. *Amnesty Int'l*, 638 F.3d at 138. I share Judge Raggi's view that the panel failed to demonstrate how an injury of this sort can be termed "fairly traceable" to the FAA under the existing precedents of the Supreme Court or this Circuit. I note, however, that the panel opinion does not even truly address the degree to which the plaintiffs' vaguely alleged self-inflicted costs must be shown to be fairly traceable to the FAA in the first place. Rather, it comes to the startling conclusion that because the *future* surveillance the plaintiffs claim to fear is "sufficiently likely [to occur] to confer standing under the test established in the case law for basing standing on the risk of future harm," *id.* at 134, the panel "need not and do[es] not decide whether the degree of likelihood necessary to establish a causal relationship between an actual present injury and the challenged governmental action is as stringent as that necessary for a potential harm in itself to confer standing," *id.*

The conclusion that the alleged risk of future surveillance here suffices to constitute injury in fact is truly unprecedented. The panel arrives at it by asserting that the standard for assessing an alleged future harm of this sort asks "whether the FAA creates an objectively reasonable likelihood that the plaintiffs' communications are being or will be monitored under the FAA." *Id.* The panel opinion provides no authority for this novel standard but instead obscures the *lack* of authority for its "future injury" holding in two ways.

First, the panel conflates the rare cases in which standing has been established based on an increased risk of harm with a distinct line of cases—inapplicable here—in which a plaintiff undisputedly subject to a particular statute is permitted to bring a pre-enforcement facial challenge even though he cannot establish with certainty that he will face prosecution should he violate the statute's terms. Thus, the opinion asserts as a general matter that "where a 'plaintiff's interpretation of a statute is "reasonable enough" and under that interpretation the plaintiff "may legitimately fear that it will face enforcement of the statute," then the plaintiff has standing to challenge the statute.'" *Id.* at 138 (quoting *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) (quoting *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000))). The cited cases, however, do not reflect a general endorsement of the proposition that a plaintiff has standing to challenge *any* statute from which he "legitimately fear[s]" harm based on a "reasonable enough" interpretation, nor could they, consistent with the Supreme Court's case law regarding standing based on future harm. Rather, these cases reflect a particular standard applicable to the specific context of pre-enforcement facial challenges, under which "[a] plaintiff . . . need not demonstrate to a certainty that it will be prosecuted under the statute to show injury, but only that it has 'an actual and well-founded fear that the law will be enforced against' it." *Vt. Right to Life Comm.*, 221 F.3d at 382 (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)). Because the FAA is not a regulatory statute that could be enforced against any plaintiff in this proceeding, these pre-enforcement facial challenge cases are of no relevance here.

The panel next purports to rely on the Supreme Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), a case it terms "the seminal case on standing based on probabilistic or prospective harm." *Amnesty Int'l*, 638 F.3d at 136. Of course, *Lyons* is the same case that the Supreme Court described two Terms ago as "an opinion that did *not* find standing, so the seeming expansiveness of [its] test made not a bit of difference." *Summers*, 129 S. Ct. at 1153.[1] Moreover, the *Summers* Court, in rejecting the claim that *Lyons* set out a new and less stringent general standard for the use of prospective harm to establish Article III standing, went on expressly to decline to replace the familiar requirement that a future harm be "imminent" to constitute injury for the purposes of standing with one that would grant standing based on a mere "realistic threat" that challenged activity will recur "in the reasonably near future." *Id.* at 1152-53 (italics omitted) (internal quotation marks omitted). Plainly, *Lyons* presents no authority for the notion that the majority's novel "objectively reasonable likelihood" test should be substituted for the Supreme Court's clear statement that "[a] threatened injury must be 'certainly impending' to constitute injury in fact." *Whitmore*, 495 U.S. at 158 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)) (internal quotation marks omitted).

---

[1] *Curtis v. City of New Haven*, 726 F.2d 65 (2d Cir. 1984), described by the panel as "articulat[ing] the principle of *Lyons* as requiring an inquiry into the probability of future harm," *Amnesty Int'l*, 638 F.3d at 136, is similarly a case in which this Court denied standing, *see Curtis*, 726 F.2d at 68-69, and thus any attempt by the panel to make use of the expansiveness of the standing principle *Curtis* supposedly articulated is subject to the same critique.

As this Court has expressly acknowledged in the past, the case law recognizing that, under certain circumstances, "threatened harm in the form of an increased risk of future injury may serve as an injury-in-fact for Article III standing purposes" has developed largely in the courts of appeals, *Baur v. Veneman*, 352 F.3d 625, 633 (2d Cir. 2003), and, in particular, in the specific context of environmental and health-related litigation, *see Natural Res. Def. Council v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006) ("[W]e have recognized that increases in risk can *at times* be 'injuries in fact' sufficient to confer standing. Environmental and health injuries often are purely probabilistic." (emphasis added) (citation omitted)); *see also Ctr. for Law and Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005) ("Outside of increased exposure to environmental harms, hypothesized 'increased risk' has never been deemed sufficient 'injury.' "); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc) ("Threatened environmental injury is by nature probabilistic."). To the limited extent the Supreme Court has itself suggested that increased risk may be relevant for standing purposes, moreover, it too has done so in the specific context of suits alleging environmental harm. *See Massachusetts v. EPA*, 549 U.S. 497, 520-23 (2007) (recognizing as injury a state's actual loss of coastal land and the risk of future loss over the course of the next century); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-85 (2000) (concluding that environmental plaintiffs subject to pollution establish injury in fact when the pollution lessens their aesthetic and recreational enjoyment of a certain place they visit, even if uncertainty exists as to the environmental harm being

caused). These cases announce no general departure from the "actual or imminent" standard. Indeed, the Supreme Court's recent decision in *Massachusetts v. EPA*, which found injury in fact arising in part from the risk of future loss of coastal land, did so only in a context in which it also carefully noted that at least two special circumstances—not present here—justified relaxation of the traditional standing rules that would otherwise apply.[2]

"Probabilistic" injury has thus never been recognized by the Supreme Court or this Circuit as sufficient as a general matter to constitute injury in fact for the purposes of Article III standing, and for good reason—as the D.C. Circuit has noted, "were all purely speculative 'increased risks' deemed injurious, the entire requirement of 'actual or imminent injury' would be rendered moot, because all hypothesized, non-imminent 'injuries' could be dressed up as 'increased risk of future injury.'" *Ctr. for Law and Educ.*, 396 F.3d at 1161.

---

[2] Thus, the Court noted that Congress had accorded the litigants in *Massachusetts v. EPA* a procedural right to protect their concrete interests, such that these litigants could "assert that right without meeting all the normal standards for redressability and immediacy." 549 U.S. at 517-18 (quoting *Lujan*, 504 U.S. at 572 n.7) (internal quotation marks omitted). In addition, the Court also relied on the fact that the party seeking review was a sovereign State rather than a private individual—a factor the Court determined entitled the Commonwealth to "special solicitude" in its standing analysis. *Id.* at 520. The absence of both circumstances here limits the applicability of *Massachusetts v. EPA* to this case. *See* Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 145-46 (6th ed. 2009) (noting the diversity of grounds relied on by the Supreme Court in *Massachusetts v. EPA* and querying whether this aspect of the decision may limit its import in future standing cases).

Such an approach would threaten grossly to distend the Judicial Branch's proper role of deciding actual cases or controversies, rendering almost any governmental action or inaction at least potentially subject to judicial review so long as a court was willing to deem it "reasonably likely" that a plaintiff might one day be affected as a result.

This Circuit's principal "probabilistic injury" case (prior to the dramatic expansion of the category that the panel opinion threatens to effect) was *Baur*, a case in which the majority expressly noted that it "need not decide as a matter of law whether enhanced risk generally qualifies as sufficient injury to confer standing" and did not "purport to imply that we would adopt such a broad view." *Baur*, 352 F.3d at 634. Rather, it held only that "[i]n the specific context of food and drug safety suits, . . . such injuries are cognizable for standing purposes, where the plaintiff alleges exposure to potentially harmful products," *id.*, and those products pose a "credible threat of harm," *id.* at 637 (internal quotation marks omitted). Acknowledging that "this type of injury has been most commonly recognized in environmental cases," the *Baur* panel critically relied on two case-specific factors, neither of which is present here, to arrive at this holding. *Id.* at 634. First, "[l]ike threatened environmental harm, the potential harm from exposure to dangerous food products or drugs 'is by nature probabilistic,' yet an unreasonable exposure to risk may itself cause cognizable injury." *Id.* (quoting *Gaston Copper*, 204 F.3d at 160). Second, "the very purpose of [the statutes alleged to have been violated] is to ensure the safety of the nation's food supply and to minimize the risk to public health from potentially dangerous food and drug products," further bolstering the case for rec-

ognizing increased risk as a sufficiently concrete and imminent injury in fact in that specific context. *Id.*

The panel identified *no* such factors in this case, nor did it engage in any similar analysis in extending the applicability of these probabilistic harm cases, decided in highly specific factual circumstances, to a setting in which the plaintiffs assert, at most, a risk of being incidentally intercepted by foreign surveillance conducted by the United States. Instead, the panel opinion states baldly that a threatened injury may be "sufficiently probable to support standing," with the ultimate inquiry "qualitative, not quantitative." *Amnesty Int'l*, 638 F.3d at 137 (quoting *Baur*, 352 F.3d at 637) (internal quotation marks omitted). While recognizing that the standing inquiry is "highly case-specific," *id.* (quoting *Baur*, 352 F.3d at 637) (internal quotation marks omitted), the panel rests its conclusion that the future harm asserted here is "sufficiently probable" solely on the fact that the FAA is "susceptible to . . . an interpretation" whereby it authorizes broad surveillance, *id.* at 138, and that the plaintiffs are "reasonable" in their assessment that they communicate with people who are likely targets of surveillance under the Act, *id.* at 139. However, even if these assertions were sufficient to establish an enhanced risk of surveillance (and I share Judge Raggi's view that they are far too speculative to do so), the panel provides no justification for the more basic question of why such increased risk should be treated as injury in the first place.

Indeed, a careful and context-sensitive analysis of previous probabilistic harm cases would suggest that their logic should *not* be extended to challenges to surveillance that is not actual or certainly impending, but

instead only feared. As Judge Raggi's dissent highlights, all the previous cases cited by the panel in which standing has been granted based on the risk of a future probabilistic injury have involved plaintiffs who had established that they were subject to the conduct they were challenging, with the only uncertainty being whether harm would ultimately result from the conduct in question. *See* Raggi, J., Op. at 17-23; *see also Laidlaw*, 528 U.S. at 184 ("[I]t is undisputed that Laidlaw's unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed. . . . [T]he only 'subjective' issue here is '[t]he reasonableness of [the] fear' that led the affiants to respond to that concededly ongoing conduct . . . ." (final two alterations in original)). None involved uncertainty as to whether the plaintiffs were in fact subject to the challenged conduct in the first place, as is the case here. Indeed, where the Supreme Court has confronted uncertainty of the latter type, it has denied standing even in the context of environmental harms. *See Summers*, 129 S. Ct. at 1152 (rejecting organizational standing even though it was "possible—perhaps even likely" that a member of the plaintiff organization used an area of the National Forest System affected by a challenged activity but no member established that they did in fact use an affected area).

In addition, unlike the environmental or health-related suits, the purported injury at issue here is not "inherently probabilistic" in the sense that it may simply be impossible, based on the limits of scientific capacity or human understanding, to know whether, for example, certain allegedly polluting activity to which would-be plaintiffs are clearly subject will in the future inflict harmful effects on them. Here, the plaintiffs' communi-

cations either are or are not being intercepted. The plaintiffs sought no discovery as to standing, despite the fact that it was their burden to show actual or imminently threatened harm. To the extent plaintiffs cannot establish the fact of surveillance either way, this is a product of: (1) the judgment of our coordinate branches (based no doubt on their own "realistic understanding of the world," *Amnesty Int'l*, 638 F.3d at 139) that foreign intelligence surveillance must be conducted in secrecy in order for it to be effective in safeguarding the national security; and (2) plaintiffs' own election not to seek discovery as to standing, and thereafter to overcome (if able) any objections to such discovery, including the application of the state secrets privilege, should it have been asserted. *See United States v. Aref*, 533 F.3d 72, 78-79 (2d Cir. 2008) ("Th[e] venerable [state secrets] evidentiary privilege 'allows the government to withhold information from discovery when disclosure would be inimical to national security.'" (quoting *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991))). It is difficult for me to fathom how any of these circumstances justifies a relaxed standing burden for the plaintiffs here, and certainly, the panel opinion fails to offer any such justification by ignoring the context-sensitive nature of the "probabilistic harm" standing cases altogether.

* * *

The standing requirement is designed to "maintain[] the public's confidence in an unelected but restrained Federal Judiciary," *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011), limiting the judiciary "to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened

injury to persons caused by private or official violation of law," *Summers*, 129 S. Ct. at 1148. Applied faithfully, it prevents the installation of "the federal courts as virtually continuing monitors of the wisdom and soundness" of both legislative and executive action. *Laird v. Tatum*, 408 U.S. 1, 15 (1972). In determining when injury in fact has been established, "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending.'" *Lujan*, 504 U.S. at 564 n.2 (emphasis added by *Lujan*) (quoting *Whitmore*, 495 U.S. at 158) (internal quotation marks omitted). The breaking point has been reached in this case.

In light of the fact that these plaintiffs cannot demonstrate even a non-speculative increased risk of surveillance (among many other bases for denying standing here) the panel need not have decided whether an "objectively reasonable" threat of future surveillance was sufficient for Article III standing. Its conclusion nevertheless that such a risk does qualify as injury in fact, however, represents a truly dramatic and unjustified expansion of this Court's probabilistic harm cases to the inapposite context of government surveillance. By allowing a sweeping facial constitutional challenge to a statute that merely sets out the manner in which the executive branch can conduct certain types of foreign surveillance, based purely on a purported increased threat of surveillance and self-inflicted costs arising out of this asserted fear, the panel ignores the animating concerns of the standing requirement and threatens without justification to transform our existing doctrine regarding claims of future harm. It is a step without

support in the case law of the Supreme Court or this Circuit, one contrary to the approaches taken in surveillance cases by our sister circuits, and one not in keeping with the limited role of the judiciary in our constitutional structure. I respectfully dissent from the denial of *en banc* review.

DENNIS JACOBS, *Chief Judge*, dissenting from the denial of rehearing *in banc*:

I concur in Judge Raggi's and Judge Livingston's scholarly dissents. I would also subscribe to Judge Koeltl's opinion dismissing this case for lack of standing. I write separately to make a few points of my own.

The panel opinion repeatedly emphasizes that its impact is on the threshold standing issue only and that it has no bearing on the merits. *See Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 121, 131, 143 n.26, 145 (2d Cir. 2011). I take the opinion on those terms. The panel opinion does indeed avoid the merits. The panel's analysis of injury simply credits as sufficient certain averments by the plaintiffs that seem to me inadequate, implausible, and illusory. And the panel's analysis of redressability, which ordinarily requires a preliminary merits review (to determine if the court could ameliorate some palpable harm to the plaintiffs), is consigned to an uninformative footnote. It is therefore quite so that the panel opinion decides nothing about the merits—and thereby leaves the way clear for dismissal after remand at a stage just beyond the threshold of standing.

That said, I think that it is a defect in the panel opinion that it elides even the glancing review of the merits that is needed to determine if the challenged statute

impairs the Fourth Amendment rights of these plaintiffs, or if they suffer an injury that a court can alleviate. That review, which I undertake here, refutes harm and redressability, and should therefore have defeated standing: These plaintiffs and their lawyers are claiming a policy-making role on matters that have no Fourth Amendment impact on them.

* * *

An assortment of lawyers, journalists and activists, and organizations representing such people, facially challenge the constitutionality of § 702 of the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. § 1881a, which was added to FISA by § 101(a)(2) of the FISA Amendments Act of 2008 (the "FAA").

Their claim is that the FAA lowers the standards for obtaining warrants to surveil foreign persons abroad, which has caused the plaintiffs, who are *not* foreigners, to develop a reasonable fear of being surveilled when communicating with foreigners around the world who are their journalistic sources, clients, human rights victims, witnesses and so on—all of whom are, in plaintiffs' estimation, potential objects of surveillance. The plaintiffs contend that this fear compels them to communicate with their clients or foreign contacts only in person, at such trouble and expense as to constitute injury that supports standing.

Three things are ordinarily required for constitutional standing: (1) injury in fact, (2) causality, and (3) redressability. If a plaintiff is not personally subject to the government action, the panel opinion identifies a fourth requirement: a "showing that [the plaintiff] has altered or ceased conduct as a reasonable response to

the challenged statute." *Clapper*, 638 F.3d at 141 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 184-85 (2000)). The plaintiffs show none of these.

* * *

To support the otherwise-mysterious idea of injury to these plaintiffs (and causation), the panel opinion relies entirely (even credulously) on affidavits submitted by the plaintiffs, describing their supposed anxieties. But these affidavits employ all the lawyer's arts to convey a devious impression.

The panel opinion bases its finding of injury and causation entirely on the ethical duties of lawyers and the affidavits of the lawyer plaintiffs.[1] So evidence about the non-lawyer plaintiffs (to the extent there is any that specifies an injury) is irrelevant here. (For some reason, the panel's mandate nevertheless confers standing indiscriminately on *all* the plaintiffs, including the journalists and various other activists.)

Among the plaintiffs who submitted affidavits, only two are lawyers who represent clients. Scott McKay, a lawyer for Guantanamo Bay detainees, does not specify

---

[1] The lawyers among the plaintiffs invoke an affidavit of Prof. Stephen Gillers, which contains a sound review of the ethical duties of lawyers:

> If an attorney has reason to believe that sensitive and confidential information related to the representation of a client and transmitted by telephone, fax, or e-mail is reasonably likely to be intercepted by others, he or she may not use that means of communication in exchanging or collecting the information. He or she must find a safer mode of communication, if one is available, which may require communication in person.

Declaration of Prof. Stephen Gillers ¶ 10.

a single trip he took or a single dollar he spent as a result of the FAA. Instead, he just avers generally that he "minimize[s] the amount of sensitive information that [he] communicate[s] by telephone or email" and that "[w]henever possible, [he] also collect[s] information in person rather than by telephone or email." Declaration of Scott McKay ¶ 8. Of course, that is what every good lawyer does—on every matter. Sylvia Royce, another lawyer representing a detainee, specifies only a single expense she attributes to the FAA: a trip to Manhattan (not Guantanamo). She avers:

> Where information is both especially important and especially sensitive, I have to travel to share information, views and ideas that I would otherwise have been able to exchange by telephone or e-mail. Most recently, I went to New York City to meet with [a French attorney] and another lawyer to talk about [my client's] case, but I also expect to travel abroad in the future to meet with co-counsel and I expect to exchange information in our meetings in person that I would not exchange by telephone or email.

Declaration of Sylvia Royce ¶ 7. Yet (as Judge Raggi points out) the FAA had nothing to do with her trip to New York to talk with co-counsel because a call between points inside the United States could not have been tapped under the FAA.

Even if one accepts the truth of these perfunctory affidavits (with their studied vagueness and anticipations of the conveniently unknown future), the declarations contained in them do not establish that either lawyer was injured or incurred expense that had any causal relation to the FAA. Yet, these affidavits provide the

only evidence to support the panel's ruling as to harm and causation.

* * *

The remaining standing issue, redressability, is consigned to a footnote in the panel opinion, a footnote that does not explain how a favorable decision in this case will redress plaintiffs' supposed injuries. *Clapper*, 638 F.3d at 140 n.24. Even if the record disclosed specific instances in which lawyers were injured by the FAA, plaintiffs would still lack standing for the reason identified by Judge Alice Batchelder in *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), an opinion that is not answered head-on by the panel opinion. Any lawyer whose ethical scruples would now prevent electronic contact with his foreign clients out of fear of surveillance would have had to incur the same bother and expense *before the FAA*, since the FISA Court has already approved thousands of warrants. *Id.* at 670-72. Thus, the plaintiffs (and the panel opinion) prove too little.

By the same token, the plaintiffs (and the panel opinion) prove too much. The ethical obligation discussed by Prof. Gillers (*see supra* note 1) has nothing to do with whether the FAA is constitutional: what is "[d]eterminative of how the lawyer may proceed is," as Prof. Gillers explains, "whether the lawyer has good reason to believe that his or her communications are reasonably likely to be intercepted, *even if the interception is lawful*." *See Clapper*, 638 F.3d at 128 (quoting Gillers Decl. ¶ 11) (emphasis added). Thus, any burden imposed on plaintiffs by the risk of surveillance arose under the pre-FAA regime as well. And since (obviously) wiretap surveillance is authorized by statutes other than the FAA, it is by no means limited to foreigners abroad. So the

inhibition that allegedly besets the plaintiffs would (if valid) affect all criminal defense lawyers—not to mention psychiatrists and the clergy—all the time.

The panel's redressability argument (following plaintiffs' affidavits) is also premised on the fanciful idea that, for a foreign person of interest abroad *in his own country*, the only risk of surveillance is surveillance *by the United States*—as though otherwise persons of interest in Iran, Syria, Bosnia, Sudan and Cuba (not to mention Russia or Spain) can chatter away confident that the security services of those countries (and others) are not listening—as though those places have a Fourth Amendment to be begin with, and adhere to it more scrupulously than does the United States. The plaintiffs' affidavits thus betray their buried assumption that the United States is the only threat to liberty that anyone anywhere needs to worry about.

* * *

Finally, the FAA does not even bear upon the plaintiffs' Fourth Amendment rights because the FAA concerns only the surveillance of persons abroad who are not United States citizens or residents. The FAA implements this limitation through minimization (procedures for limiting the information received and retained by electronic surveillance) and targeting (procedures for limiting the persons and facilities to be surveilled), and the FISA Court is given power to review those procedures for compliance with the Fourth Amendment.[2]

---

[2] Under the FAA, a surveillance order shall issue:

> If the Court finds that a certification submitted in accordance with subsection (g) contains all the required elements and that the targeting and minimization procedures adopted in accordance with subsec-

Since the FAA bars the targeting of individuals in or of the United States, there can be nothing for the FISA Court to consider under the Fourth Amendment *but* those procedures.

And as to persons abroad, with whom the plaintiffs claim to be in communication: "the Fourth Amendment has no application" to the search of a person of foreign nationality, outside the United States, with "no voluntary attachment" to this country. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274, 275 (1990); *see also In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157, 171 (2d Cir. 2008) (holding "that the Fourth Amendment's Warrant Clause has no extraterritorial application" to searches of United States citizens abroad).

In short, the FAA does not implicate any Fourth Amendment right of any plaintiff, or of any foreign person with whom any plaintiff may communicate.

* * *

Since these plaintiffs are not subject to the FAA, and since the Fourth Amendment has no application to their supposed clients, sources and communicants—who are foreign persons abroad—and since the only evidence they proffer of personal inconvenience and expense are affidavits that are craftily worded to skirt actual falsehood, what is the interest in bringing this suit?

---

tions (d) [targeting] and (e) [minimization] are consistent with the requirements of those subsections *and with the fourth amendment to the Constitution of the United States.*

50 U.S.C. § 1881a(i)(3)(A) (emphasis added).

At the risk of being obvious, the purpose of this lawsuit is litigation for its own sake—for these lawyers to claim a role in policy-making for which they were not appointed or elected, for which they are not fitted by experience, and for which they are not accountable. As best I can see, the only purpose of this litigation is for counsel and plaintiffs to act out their fantasy of persecution, to validate their pretensions to policy expertise, to make themselves consequential rather than marginal, and to raise funds for self-sustaining litigation. In short, counsel's and plaintiffs' only perceptible interest is to carve out for themselves an influence over government policy—an interest that the law of standing forecloses.

For the foregoing reasons, I conclude that the plaintiffs suffered no injury, and certainly none that can be redressed by this Court. In part, that is a function of the frivolous nature of the claim. In that respect, it bears similarity to a *pro se* plaintiff's allegation that the CIA is controlling him through a radio embedded in his molar. But, as to the standing analysis, there is this difference: The *pro se* plaintiff is actually suffering, is truly hoping for redress, and is not bringing suit as a pretext to weigh in on government policy.

PETER W. HALL, Circuit Judge, dissenting from the denial of rehearing *in banc*:

I respectfully dissent from the denial of rehearing *in banc* solely because I believe this case "involves a question of exceptional importance" warranting *in banc* review. Fed. R. App. P. 35(a)(2).

No.

In the Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI (VOLUME 2)

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DOUGLAS N. LETTER
DANIEL J. LENERZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

Volume 1

Appendix A – Court of Appeals Opinion (Mar. 21, 2011) 1a

Appendix B – District Court Opinion (Aug. 20, 2009) 62a

Appendix C – Order denying rehearing (Sept. 21, 2011) 114a

Volume 2

Appendix D – Complaint (filed July 10, 2008) 197a

Appendix E – Declaration of Jameel Jaffer (filed Sept. 12, 2008) 243a

Exhibit A – James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, New York Times (Dec. 16, 2005) 247a

Exhibit B – *The President's Radio Address*, 41 Weekly Comp. Pres. Docs 1880 (Dec. 17, 2005) 262a

Exhibit C – Excerpts from *The President's News Conference*, 41 Weekly Comp. Pres. Docs 1885 (Dec. 19, 2005) 266a

Exhibit D – Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005) 272a

Table of Contents—Continued: Page

Exhibit E – Excerpts from Remarks by General Michael V. Hayden at the National Press Club (Jan. 23, 2006) (full text available at http://www.dni.gov/speeches/printer_friendly/20060123_speech_print.htm) 294a

Exhibit F – Letter from Attorney General Alberto R. Gonzales to Senator Patrick Leahy and Senator Arlen Specter (dated Jan. 17, 2007) 312a

Exhibit G – Chris Roberts, *Transcript: Debate on the Foreign Intelligence Surveillance Act*, El Paso Times (Aug. 22, 2007) 315a

Exhibit H – Mike McConnell, *A Law Terrorism Outran: We Need a FISA For the 21st Century*, Washington Post (May 21, 2007) .. 331a

Appendix F – Declaration of Naomi Klein (filed Sept. 12, 2008) 334a

Appendix G – Declaration of Joanne Mariner (filed Sept. 12, 2008) 340a

Appendix H – Declaration of Sylvia Royce (filed Sept. 12, 2008) 348a

Appendix I – Declaration of John Walsh (filed Sept. 12, 2008) 354a

Appendix J – Declaration of Christopher L. Hedges (filed Dec. 15, 2008) 363a

Table of Contents—Continued: Page

Appendix K – Declaration of Scott McKay (filed Dec. 15, 2008) 368a

Appendix L – Declaration of Professor Stephen Gillers (filed Dec. 15, 2008) (Exhibit A omitted) 376a

Appendix M – Declaration of Steven M. Bellovin (filed Dec. 15, 2008) 389a

Appendix N – Statement of Undisputed Facts in Support of Respondents' Motion for Summary Judgment (filed Sept. 12, 2008) 396a

Appendix O – Petitioners' Response to Respondents' Statement of Undisputed Facts (filed Oct. 28, 2008) 402a

Appendix P – Respondents' Supplemental Statement of Undisputed Facts (filed Dec. 12, 2008) 410a

Appendix Q – Statutory Provisions 415a

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: July 10, 2008

COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

---

1. This is a challenge to the constitutionality of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, *et seq.* ("FISA"), as amended by H.R. 6304, the FISA Amendments Act of 2008 ("FISA Amendments Act," "FAA," or "Act"), which the President signed into law on July 10, 2008. As amended, FISA allows the executive branch sweeping and virtually unregulated authority to monitor the international communications—and in some cases the purely domestic communications—of law-abiding U.S. citizens and residents. The amended law (the "challenged law") eviscerates the "[c]lear legal standards and effective oversight and controls" that the Senate Church Committee concluded in 1978 were necessary to ensure that government surveillance did "not itself undermine the democratic system it [was] intended to protect."

2. Plaintiffs are attorneys and human rights, labor, legal, and media organizations whose work requires them to engage in sensitive and sometimes privileged telephone and email communications with colleagues, clients, journalistic sources, witnesses, experts, foreign government officials, and victims of human rights abuses located outside the United States. Because of the nature of their communications and the identities and geographic location of the individuals with whom they communicate, plaintiffs reasonably believe that their communications will be monitored under the challenged law. The challenged law compromises plaintiffs' ability to gather information, represent their clients, and engage in domestic and international advocacy. It requires plaintiffs to take costly and burdensome measures to protect the confidentiality of sensitive and privileged communications, and it undermines plaintiffs' ability to

engage in communications that are relevant and necessary to their work.

3. Plaintiffs recognize that the government has a legitimate interest in monitoring the communications of individuals who are reasonably thought to pose a threat to the United States. Where government surveillance implicates the rights of U.S. citizens and residents, however, it must be conducted in a manner that comports with the Constitution. The law challenged here supplies none of the safeguards that the Constitution demands. It permits the government to monitor the communications of U.S. citizens and residents without identifying the people to be surveilled; without specifying the facilities, places, premises, or property to be monitored; without observing meaningful limitations on the retention, analysis, and dissemination of acquired information; without obtaining individualized warrants based on criminal or foreign intelligence probable cause; and, indeed, without even making prior *administrative* determinations that the targets of surveillance are foreign agents or connected in any way, however tenuously, to terrorism. In effect, the challenged law allows the mass acquisition of U.S. citizens' and residents' international communications. In some circumstances, it allows the warrantless acquisition of purely domestic communications as well. Plaintiffs respectfully seek (i) a declaration that the challenged law violates the First and Fourth Amendments to the U.S. Constitution, Article III, and the principle of separation of powers; and (ii) a permanent injunction against the law's use.

JURISDICTION AND VENUE

4. Jurisdiction is properly vested in this Court pursuant to 28 U.S.C. § 1331 over causes of action aris-

ing under the U.S. Constitution. The Court has authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* The Court has authority to award costs and attorneys' fees under 28 U.S.C. § 2412.

5. Venue is proper in this district under 28 U.S.C. § 1391(e).

PLAINTIFFS

6. Amnesty International USA ("AIUSA"), a section of Amnesty International, is a grassroots activist organization based in New York City. It undertakes research and action to prevent and end grave abuses of all human rights—civil, political, social, cultural and economic. AIUSA sues on its own behalf and on behalf of its staff.

7. Global Fund for Women ("GFW") is a non-profit grantmaking foundation based in San Francisco, CA. GFW advances women's human rights worldwide by providing funds to women-led organizations that promote the economic security, health, safety, education, and leadership of women and girls. GFW sues on its own behalf and on behalf of its staff.

8. Global Rights is a human rights organization based in Washington, D.C. With offices around the world, Global Rights partners with local activists to challenge injustice and amplify new voices within the global discourse. Global Rights sues on its own behalf and on behalf of its staff.

9. Human Rights Watch ("HRW") is a non-profit, non-governmental human rights organization based in New York City. HRW researchers conduct factfinding investigations into human rights abuses in all regions of

the world and publish their findings in hundreds of reports and other documents every year. HRW sues on its own behalf and on behalf of its staff.

10. The International Criminal Defence Attorneys Association ("ICDAA") is a non-profit organization incorporated in the United States and Canada that seeks to create the foundations for a full, fair, and well-organized defense in proceedings before international tribunals. The ICDAA sues on its own behalf and on behalf of its members.

11. The Nation Magazine ("The Nation"), which is published by The Nation Company, L.P., and based in New York City, is America's oldest weekly magazine of opinion, news, and culture. Its editorial mission is to bring a critical, independent, and progressive spirit to the reporting and analysis of politics, social issues, culture, and the arts. In recent years, The Nation's journalists have won national and international awards for their investigative reporting about issues relating to national security, terrorism, human rights, and the wars in Iraq and Afghanistan. The Nation sues on behalf of itself, its staff, and certain of its contributing journalists.

12. PEN American Center ("PEN") is a human rights and literary association based in New York City. Committed to the advancement of literature and the unimpeded flow of ideas and information, PEN fights for freedom of expression; advocates on behalf of writers harassed, imprisoned, and sometimes killed for their views; and fosters international exchanges, dialogues, discussions, and debates. PEN sues on its own behalf and on behalf of its staff and members.

13. Service Employee International Union ("SEIU") is the fastest growing labor organization in

the Americas, representing 2 million members located across the United States, Canada, and Puerto Rico. With headquarters in Washington, D.C., SEIU is dedicated to improving the lives of workers and their families and creating a more just and humane society. SEIU works with counterpart unions abroad and with international global union federations to advance workers rights at home and abroad. SEIU sues on its own behalf and on behalf of its staff.

14. The Washington Office on Latin American ("WOLA") is a non-profit, non-governmental organization based in Washington, D.C. that conducts research, advocacy, and education designed to promote human rights, democracy, and social justice in Latin America. WOLA sues on its own behalf and on behalf of its staff.

15. Daniel N. Arshack is a founding partner of the law firm Arshack, Hajek and Lehrman, PLLC, located in New York City. His practice includes the representation of defendants and witnesses in domestic criminal proceedings and international criminal tribunals. Mr. Arshack sues on his own behalf.

16. David Nevin is a founding partner of the law firm Nevin, Benjamin, McKay & Bartlett LLP located in Boise, ID. His practice includes the representation of criminal defendants and civil litigants in cases relating to terrorism and national security. Mr. Nevin sues on his own behalf.

17. Scott McKay is a partner with the law firm of Nevin, Benjamin, McKay & Bartlett LLP located in Boise, ID. His practice includes the representation of criminal defendants and civil litigants in cases relating to terrorism and national security. Mr. McKay sues on his own behalf.

18. Sylvia Royce is a former Assistant U.S. Attorney for the District of Columbia and the former Chief of International Prisoner Transfer at the U.S. Department of Justice. Her practice, based in Washington, D.C., includes representation of individuals detained at Guantanamo Bay as well as individuals imprisoned in the United States seeking transfer to their home countries. Ms. Royce sues on her own behalf.

DEFENDANTS

19. Defendant John M. McConnell is the Director of National Intelligence ("DNI"). DNI McConnell has ultimate authority over the activities of the U.S. intelligence community. Under the challenged law, the DNI and the Attorney General have joint authority to authorize the mass acquisition of U.S. citizens' and residents' international communications.

20. Defendant Lieutenant General Keith B. Alexander is the Director of the National Security Agency ("NSA") and Chief of the Central Security Service. Lt. Gen. Alexander has ultimate authority for supervising and implementing all operations and functions of the NSA, the agency that conducts the surveillance authorized by the challenged law.

21. Defendant Michael B. Mukasey is Attorney General of the United States. Attorney General Mukasey has ultimate authority over the Department of Justice. Under the challenged law, the Attorney General and the DNI have joint authority to authorize the mass acquisition of U.S. citizens' and residents' international communications.

BACKGROUND

The Foreign Intelligence Surveillance Act

22. In 1978, Congress enacted the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*, ("FISA"), to regulate government surveillance conducted for foreign intelligence purposes. The statute created the Foreign Intelligence Surveillance Court ("FISC") and empowered the court to grant or deny government applications for surveillance orders in foreign intelligence investigations. *See* 50 U.S.C. § 1803(a).

23. Congress enacted FISA after the U.S. Supreme Court held, in *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972), that the Fourth Amendment does not permit warrantless surveillance in intelligence investigations of domestic security threats. FISA was a response to that decision and to years of in-depth congressional investigation, which revealed that the executive branch had engaged in widespread warrantless surveillance of U.S. citizens—including journalists, activists, and members of Congress—"who engaged in no criminal activity and who posed no genuine threat to the national security."

24. Congress has amended FISA multiple times. In its current form, the statute regulates, among other things, "electronic surveillance," which is defined to mean:

> (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United

States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States . . . ;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; and

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes. 50 U.S.C. § 1801(f).

25. Before passage of the FISA Amendments Act of 2008, FISA generally foreclosed the government from engaging in "electronic surveillance" without first obtaining an individualized and particularized order from

the FISC. To obtain an order, the government was required to submit an application that identified or described the target of the surveillance; explained the government's basis for believing that "the target of the electronic surveillance [was] a foreign power or an agent of a foreign power"; explained the government's basis for believing that "each of the facilities or places at which the electronic surveillance [was] directed [was] being used, or [was] about to be used, by a foreign power or an agent of a foreign power"; described the procedures the government would use to "minimiz[e]" the acquisition, retention, and dissemination of non-publicly available information concerning U.S. persons; described the nature of the foreign intelligence information sought and the type of communications that would be subject to surveillance; and certified that a "significant purpose" of the surveillance was to obtain "foreign intelligence information." 50 U.S.C. § 1804(a) (2006). "Foreign intelligence information" was defined broadly (and is still defined broadly) to include, among other things, information concerning terrorism, national security, and foreign affairs.

26. Before the passage of the FISA Amendments Act, the FISC was empowered to grant surveillance orders if it determined that a government surveillance application met the statutory requirements; that there was "probable cause to believe that the target of the electronic surveillance [was] a foreign power or an agent of a foreign power"; that "each of the facilities or places at which the electronic surveillance [was] directed [was] being used, or [was] about to be used, by a foreign power or an agent of a foreign power"; and that the government's proposed minimization procedures met the statutory minimization requirements. 50 U.S.C. § 1805 (2006).

27. Congress intended FISA (together with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, which governs electronic surveillance conducted for law enforcement purposes) to supply the "exclusive means" by which the executive branch could lawfully engage in electronic surveillance within the country's borders. 18 U.S.C. § 2511(2)(f). In enacting FISA, Congress expressly prohibited electronic surveillance "except as authorized by statute," 50 U.S.C. § 1809(a)(1), and it specified civil and criminal penalties for electronic surveillance undertaken without statutory authority, 50 U.S.C. §§ 1809 & 1810.

The President's Warrantless Surveillance Program

28. In the fall of 2001, President Bush secretly authorized the National Security Agency ("NSA") to inaugurate a program of warrantless electronic surveillance inside the United States (the "Program"). President Bush publicly acknowledged the Program after *The New York Times* reported its existence in December 2005. The President reauthorized the Program repeatedly between 2001 and 2007.

29. According to public statements made by senior government officials, the Program involved the interception of emails and telephone calls that originated or terminated inside the United States. The interceptions were not predicated on judicial warrants or any other form of judicial authorization; nor were they predicated on any determination of criminal or foreign-intelligence probable cause. Instead, according to then-Attorney General Alberto Gonzales and then-NSA Director General Michael Hayden, NSA "shift supervisors" initiated surveillance when in their judgment there was a "reasonable basis to conclude that one party to the communi-

cation [was] a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."

30. On January 17, 2007, then-Attorney General Alberto Gonzales publicly announced that a judge of the FISC had "issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization." The Attorney General further stated that "[a]s a result of these orders, any electronic surveillance that was occurring as part of the [Program] will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court."

31. The FISC orders issued in January 2007 were modified in the spring of that same year. The modifications reportedly narrowed the authority that the FISC had extended to the executive branch in January. Following the FISC's modification of its January 2007 orders, DNI McConnell appealed to Congress to amend FISA.

The Protect America Act

32. Congress enacted the Protect America Act in August 2007. The Act expanded the executive's surveillance authority and provided legislative sanction for surveillance that the President had previously been conducting under the Program. Although the law eviscerated a regulatory framework that had been in place for almost thirty years, Congress enacted the law without holding a single hearing and after only four days of debate.

33. Because of a "sunset" provision, the amendments made by the Protect America Act ceased to have effect on Feb. 17, 2008. Surveillance orders that had been issued during the Protect America Act's life, however, will continue in effect for up to one year from the date they were issued.

The FISA Amendments Act of 2008

34. In anticipation of the Protect America Act's expiration, the administration lobbied Congress for permanent changes to FISA. President Bush signed the FISA Amendments Act into law on July 10, 2008. Like the Protect America Act, the FISA Amendments Act provides legislative sanction for the warrantless surveillance of U.S. citizens' and residents' communications. It also provides immunity to telecommunications corporations that facilitated the Program.

35. The Act allows the mass acquisition of U.S. citizens' and residents' international telephone and email communications. Under section 702(a) of the Act, the Attorney General and the DNI can "authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." An acquisition under section 702(a) may not "intentionally target any person known at the time of the acquisition to be located in the United States"; "intentionally target a person reasonably believed to be outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States"; "intentionally target a United States person reasonably believed to be located outside the United States"; or "intentionally acquire any communication as to which

the sender and all intended recipients are known at the time of the acquisition to be located in the United States." FAA § 702(b).

36. Critically, however, an acquisition authorized under section 702(a) may encompass the international communications of U.S. citizens and residents. Indeed, the Attorney General and the DNI may authorize a mass acquisition under section 702(a) even if *all* of the communications to be acquired originate or terminate inside the United States. Moreover, the Attorney General and the DNI may acquire purely domestic communications as long as there is uncertainly about the location of one party to the communications.

37. Before authorizing surveillance under section 702(a), the Attorney General and the DNI must either obtain an order from the FISC (a "mass acquisition order") or make an "exigent circumstances" determination that "intelligence important to the national security of the United States may be lost or not timely acquired and time does not permit the issuance of an order . . . prior to the implementation of such authorization." FAA § 702(a) & (c)(2). If the Attorney General and the DNI authorize surveillance under section 702(a) without first obtaining a mass acquisition order from the FISC, they must seek such an order from the FISC "as soon as practicable but in no event later than 7 days after such determination [of exigent circumstances] is made." FAA § 702(g)(1)(B).

38. To obtain a mass acquisition order from the FISC, the Attorney General and the DNI must provide to the FISC "a written certification and supporting affidavit" attesting that the FISC has approved, or that the government has submitted to the FISC for approval,

procedures ("targeting procedures") reasonably designed to (i) ensure that the acquisition is "limited to targeting persons reasonably believed to be located outside the United States" and (ii) "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." FAA § 702(g)(2)(A)(i). The certification and supporting affidavit must attest that the FISC has approved, or that the government has submitted to the FISC for approval, procedures ("minimization procedures") that meet the definition of "minimization procedures" under 50 U.S.C. §§ 1801(h) or 1821(4). The certification and supporting affidavit must also attest that the Attorney General has adopted "guidelines" to ensure compliance with the limitations set out in section 702(b); that the targeting procedures, minimization procedures, and guidelines are consistent with the Fourth Amendment; that "a significant purpose of the acquisition is to obtain foreign intelligence information"; that "the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider"; and that "the acquisition complies with the limitations in subsection [702(b)]." FAA § 702(g)(2)(A)(iii)-(vii).

39. The Act does not require the government to demonstrate to the FISC that its surveillance targets are foreign agents, engaged in criminal activity, or connected even remotely with terrorism. Indeed, the statute does not require the government to identify its surveillance targets at all. Moreover, the statute expressly provides that the government's certification is not required to identify the facilities, telephone lines, email addresses, places, premises, or property at which its

surveillance will be directed. FAA § 702(g)(4). Thus, the government may obtain a mass acquisition order without identifying the people (or even the group of people) to be surveilled; without specifying the facilities, places, premises, or property to be monitored; without obtaining individualized warrants based on criminal or foreign intelligence probable cause; and without making even a prior administrative determination that the acquisition *relates to* a particular foreign agent or foreign power.

40. The Act does not place meaningful limits on the government's retention, analysis, and dissemination of U.S. communications and information that relates to U.S. citizens and residents. While the Act requires the government to adopt "minimization" procedures that are "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination of nonpublicly available information concerning unconsenting United States persons," the statute does not prescribe specific minimization procedures, does not give the FISA court any authority to oversee the implementation of the procedures, and specifically allows the government to retain and disseminate information—including information relating to U.S. citizens and residents if the government concludes that it is "foreign intelligence information." Nothing in the Act forecloses the government from compiling databases of such "foreign intelligence information" and searching those databases for information about specific U.S. citizens and residents.

41. The FISC is required to issue a mass acquisition order if it finds that the government's certification "contains all the required elements" and that the "targeting and minimization procedures" are consistent with

the requirements of the statute and the Fourth Amendment. FAA § 702(i)(3)(A).

42. With respect to any acquisition authorized under section 702(a), the Attorney General and DNI may direct any electronic communication service provider immediately to "provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition." FAA § 702(h)(1)(A). "Electronic communication service provider," a term that is defined more narrowly in other contexts, *see, e.g.*, 18 U.S.C. § 2510(15), is defined broadly to include, *inter alia*, telecommunications carriers, providers of remote computing service, and "any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored." FAA § 701(b)(4).

43. The role of the FISC in authorizing and supervising surveillance conducted under the FISA Amendments Act is narrowly circumscribed. While the FISC reviews the government's certifications, targeting procedures, and minimization procedures, it does not consider individualized and particularized surveillance applications, it does not make individualized probable cause determinations, and it does not supervise the *implementation* of the government's targeting or minimization procedures. As noted above, the FISC is authorized to reject an application for a mass acquisition order if it finds that the government's certification or procedures are deficient. Even if the FISC rejects the government's certification or procedures, however, the government "may continue" its surveillance activities during the pendency of any appeal or further court proceedings. FAA § 702(i)(4)(B). In other words, the statute

permits the government to continue its surveillance activities even if the FISC has concluded that those activities are inconsistent with the statute or are unconstitutional.

PLAINTIFFS' ALLEGATIONS

44. Plaintiffs are attorneys and human rights, labor, legal, and media organizations whose work requires them to engage in sensitive and sometimes privileged communications, both domestic and international, with clients, journalistic sources, witnesses, experts, foreign government officials, and victims of human rights abuses.

45. Because of the scope of the challenged law, the nature of their communications, and the location and identities of the individuals with whom they communicate, plaintiffs reasonably believe that their communications will be acquired, retained, analyzed, and disseminated under the challenged law.

46. Some of the plaintiffs, in connection with their legitimate professional activities, communicate with people whom the U.S. government is likely to target when conducting foreign intelligence surveillance of persons abroad, including foreign government officials, political activists, and individuals alleged to be engaged in terrorism or associated with terrorist organizations.

47. Some of the plaintiffs, in connection with their legitimate professional activities, communicate with people in countries and geographic regions that the U.S. government is likely to target when conducting foreign intelligence surveillance of persons abroad, including regions that are the specific focus of the U.S. government's counterterrorism or diplomatic activities.

48. Some of the information that plaintiffs exchange by telephone and email is "foreign intelligence information" within the meaning of the challenged law.

49. Because of the challenged law, plaintiffs will have to take burdensome and costly measures to minimize the chance that the confidentiality of their sensitive information will be compromised. The challenged law will require plaintiffs to develop new protocols for dealing with sensitive information, to travel long distances to collect information that could otherwise have been gathered by telephone or email, and in some circumstances to forgo particularly sensitive communications altogether.

50. Because of the challenged law, plaintiffs will be less able to gather information, represent their clients, and engage in domestic and international advocacy. The challenged law reduces the likelihood that clients, journalistic sources, witnesses, experts, foreign government officials, and victims of human rights abuses will share sensitive information with the plaintiffs.

51. The challenged law is inhibiting, and unless enjoined will continue to inhibit, the legitimate and constitutionally protected communications of plaintiffs and others not before the Court.

Amnesty International USA

52. Amnesty International is the world's oldest and largest grassroots human rights organization. Amnesty International USA is Amnesty International's largest national section, comprising more than 330,000 members and 1,850 student and local groups. Through its campaigns, AIUSA seeks to expose and stop human rights abuses—for example, to force repressive govern-

ments to release prisoners of conscience (individuals detained solely for the peaceful expression of their beliefs); prevent torture and illegal detention; alert the world to the horrors of human trafficking; confront violence against women; and control the spread of small arms, which contribute to abuses in armed conflict.

53. AIUSA conducts research and advocacy about a wide range of human rights violations in the United States and internationally. Over the last six years, AIUSA has participated in extensive research and advocacy about topics including the detention of individuals in secret locations in Yemen and Afghanistan; the illegal transfer of detainees to countries like Syria, Egypt, and Jordan; the uninvestigated murders of women in Guatemala; and human rights abuses in Nepal and Indonesia.

54. Because of the nature of its advocacy work and the global nature of Amnesty International's network, members of AIUSA's staff and volunteer experts routinely exchange sensitive information by telephone and email with individuals located outside the United States. Some of this information constitutes "foreign intelligence information" as that term is defined in the challenged law. For example, AIUSA staff communicate with Amnesty International researchers based in London who investigate human rights abuses relating to terrorism and counterterrorism, the wars in Afghanistan and Iraq, the CIA's extraordinary rendition program, secret prisons, prison conditions, and international complicity in human rights abuses. Staff exchange sensitive information through their communications, including facts provided by confidential sources, news regarding investigations into European and U.S.

complicity in human rights abuses around the world, and plans for specific advocacy strategies.

55. Because of the nature of its staff members' communications and the identity and location of those with whom they communicate, AIUSA reasonably believes that its staff members' communications will be monitored under the challenged law.

56. The challenged law undermines the ability of AIUSA and its staff to gather information that is relevant and necessary to their work. The law will require AIUSA's staff to travel to collect information that otherwise could have been gathered by telephone or email, and in some circumstances to forgo particularly sensitive communications altogether. The challenged law also reduces the likelihood that sources, witnesses, experts, foreign government officials, and victims of human rights abuses will share sensitive information with AIUSA's staff. Many of the individuals with whom AIUSA's staff communicate are vulnerable to persecution and retaliation by their own governments and by non-governmental actors. These individuals will be less willing or unwilling to share information with AIUSA if they believe that the information cannot be kept confidential.

Global Fund for Women

57. Global Fund for Women is a 501(c)(3) grant-making foundation that advances women's human rights worldwide. The organization raises funds from a variety of sources and makes grants to women-led organizations that promote the economic security, health, safety, education, and leadership of women and girls. Since 1987, GFW has awarded more than $62 million to more than

3,500 women's organizations in 169 countries, with typical grants ranging from $1,000 to $20,000.

58. While GFW is based in the United States, its relationships and operations are global. For guidance in grantmaking decisions, GFW draws on the resources of approximately 120 expert advisors who provide critical information to GFW about its grantees. GFW is governed by a sixteen-member Board of Directors and approximately half of the Board members are located outside of the United States. GFW employs approximately forty-five staff members, about half of whom interact directly with the international community.

59. Because of the nature of its grantmaking work, GFW's staff routinely exchange sensitive information by telephone and email with individuals located abroad. Some of this information is "foreign intelligence information" within the meaning of the challenged law. For example, GFW's staff communicate with prospective, current, and former grantees, as well as with GFW's world-wide network of advisors, in conflict zones such as Iraq, Pakistan, Indonesia, Colombia, Palestine, Afghanistan, and Turkey. Some of these communications are related to security concerns, political developments, and the domestic human rights situation in these countries. Members of GFW's staff also communicate with individuals abroad about U.S. foreign policy and about the policies and programs of foreign government agencies.

60. Because of the nature of its staff members' communications and the identity and location of those with whom they communicate, GFW reasonably believes that its staff members' communications will be monitored under the challenged law.

61. The challenged law undermines GFW's ability to gather the information it needs to make grantmaking decisions and to support its grantees. For example, the challenged law will impede GFW's ability to expand its grantmaking in the Middle East and North Africa—two regions to which GFW is particularly committed—because prospective grantees in these areas will likely be less willing to communicate with GFW if they believe that the privacy of their communications cannot be ensured. The challenged law impairs GFW's ability to engage in international communications that are necessary to carry out its work.

Global Rights

62. Global Rights is a human rights advocacy group that partners with local activists to challenge injustice and amplify new voices within the global discourse. Global Rights has nearly 100 employees, approximately twenty-five of whom are located in the United States; the remaining employees are located in field offices throughout the world. Global Rights works directly with local activists and organizations to create more rights-respecting societies. Global Rights and its partners often promote equality in hostile environments. As a result, Global Rights has developed an understanding of the day-to-day realities facing civil society in post-conflict situations, during prolonged transitions to democratic rule, and in cultural environments that resist the promotion and protection of the human rights of women.

63. In furtherance of its human rights advocacy, Global Rights staff members routinely communicate by telephone and email with individuals located abroad. The majority of these communications are between Global Rights staff in its Washington, D.C. office and

Global Rights field offices or staff in Afghanistan, Bosnia and Herzegovina, Burundi, Colombia, the Democratic Republic of Congo, Liberia, Algeria, Tunisia, Morocco, Nepal, and Nigeria. Both U.S. citizens and foreign nationals staff the field offices.

64. Some of the information that Global Rights staff exchange by telephone and email constitutes "foreign intelligence information" as that term is defined in the challenged law. For example, Global Rights D.C.-based staff members communicate with Global Rights staff in Afghanistan about issues such as justice system reform, political participation, women's rights, and the specific Global Rights projects designed to promote these goals. These projects include Young Lawyers in Training, which provides law students at several universities with practical training on Afghan criminal and civil law, and the Access to Justice Program, which builds the capacity of legal service providers—particularly with respect to women's rights and family rights under Afghan law and Sharia. In connection with their work in Afghanistan, Global Rights staff communicate with Afghan judges, prosecutors, investigators from the Attorney General's office, and other members of the Afghan government.

65. Global Rights also works in the Democratic Republic of Congo, through local offices in Kinshasa and Bukavu, to promote access to justice and combat impunity for grave violations of human rights, to encourage political participation, and to secure legislation critical to ensuring human rights protection. This work requires Global Rights staff to identify and discuss the operations of local human rights groups that document and expose atrocities committed against civilians, and to

discuss strategies for holding human rights abusers accountable before national courts and international bodies such as the International Criminal Court. Some of Global Rights' communications relate to the foreign affairs of the United States.

66. Because of the nature of its staff members' communications and the identity and location of those with whom they communicate, Global Rights reasonably believes that its staff members' communications will be monitored under the challenged law.

67. The challenged law undermines Global Rights' ability to gather information and engage in advocacy. Global Rights' effectiveness depends entirely upon the strength of its relationships with local civil society actors, human rights organizations, and women's rights groups. Those relationships often demand strict confidentiality. The likelihood that Global Rights' international communications will be monitored by the U.S. government will make its partners abroad reluctant to communicate with Global Rights staff. This in turn will deprive Global Rights' staff of information that is relevant and in some cases necessary to their work. Global Rights' inability to communicate confidentially with members, experts, and leaders of government and industry will seriously impede Global Rights' efforts to help its local partners become more effective advocates for political change, human rights, and respect for the rule of law.

Human Rights Watch

68. Human Rights Watch is a non-profit, non-governmental human rights organization based in New York City. It employs over 246 staff members located across offices in Brussels, Geneva, London, Moscow,

Paris, Hong Kong, Johannesburg, Los Angeles, New York City, San Francisco, Tashkent, Toronto, and Washington, D.C. Formed in 1978, HRW is dedicated to protecting the human rights of people around the world. The hallmark of HRW's work is its commitment to even-handed, accurate reporting on human rights abuses throughout the globe.

69. HRW researchers conduct fact-finding investigations into human rights abuses by governments and non-state actors in all regions of the world. Its researchers are currently investigating topics ranging from brutal government-sponsored repression in Zimbabwe to the state of the justice system in Iraq. HRW's investigations usually lead to reports and other materials for publication, which generate extensive coverage in local and international media. HRW also works to create a dialogue with offending governments to encourage them to change abusive laws and policies, and, through its advocacy, it enlists the support of other influential actors such as the United Nations, the European Union, international financial institutions, the U.S. government, as well as civil society organizations, to achieve this end.

70. HRW's reporting and advocacy work requires HRW's U.S.-based staff to communicate by telephone and email with individuals located abroad. Some of the information exchanged during these connnunications constitutes "foreign intelligence information" as that term is defined in the challenged law. For example, Iain Levine, HRW's Program Director, who is based in New York City, often connnunicates with HRW staff abroad about HRW's work concerning conflict, political crises, refugees, HIV/AIDS, the Middle East, North Africa, and Sub-Saharan Africa. He regularly needs speaks

[*sic*] with HRW staff in countries with delicate security situations, such as Zimbabwe, Chad, Iraq, and Afghanistan. Joanne Mariner, Terrorism and Counterterrorism Program Director at HRW, who is also based in New York City, communicates regularly via telephone and email with individuals abroad about individuals detained by the CIA, the CIA's "rendition" program, the intelligence services of foreign countries, and U.S. counterterrorism measures. These communications are necessary to her research about U.S. human rights abuses and the complicity of Middle Eastern and Asian governments in these abuses.

71. Because of the nature of its staff members' communications and the identity and location of those with whom they communicate, HRW reasonably believes that its staff members' communications will be monitored under the challenged law.

72. The challenged law undermines the ability of HRW and its staff to develop and conduct research missions necessary for their advocacy and reporting work. The law will require HRW staff to take costly and burdensome measures to protect the confidentiality of their communications. In some cases, it will require HRW to send staff abroad to gather or verify information that could otherwise have been gathered or verified via telephone or email. For example, Joanne Mariner anticipates traveling to Jordan, Egypt, and countries in Europe to interview victims of and witnesses to human rights abuses whom she would otherwise have interviewed by telephone. Overseas trips of this kind are time-consuming and costly.

73. The challenged law will also discourage witnesses, experts, victims, foreign government officials,

and human rights defenders from sharing information with HRW staff. Those who speak to HRW researchers often do so on condition of confidentiality, because they fear repercussions from their own governments, from the U.S. government, or from non-governmental entities. Some of the people whom HRW depends upon for information will decline to share information with HRW if they believe that the confidentiality of their identities and information cannot be ensured. This means that HRW will be deprived of information that is relevant and in some cases critical to its work.

International Criminal Defence Attorneys Association

74. The International Criminal Defence Attorneys Association is a non-profit organization incorporated in the United States and Canada that seeks to create the foundations for a full, fair, and well-organized defense in proceedings before international tribunals, such as the International Criminal Tribunal for Rwanda based in Arusha, Tanzania; the International Criminal Tribunal for the former Yugoslavia; and the recently established International Criminal Court (ICC), both based in The Hague, the Netherlands. The ICDAA works to organize a full, thorough, and structured defense with the aim of bolstering the legitimacy of the judicial process established by the international community to prosecute war crimes and crimes against humanity; bring together in a professional association the defense attorneys who are responsible for preparing and pleading cases to be tried by various international tribunals; share with the international community experience and knowledge derived from the adversarial system of justice; encourage communication among lawyers specializing in criminal law from countries around the world; and assist in the devel-

opment of international criminal law and in particular of international institutions such as the ICC. ICDAA membership is comprised of organizations and criminal defense lawyers from around the world, including from the United States.

75. ICDAA's members, including its members inside the United States, routinely engage in sensitive and privileged international communications relating to their representation of criminal defendants. For example, members of the ICDAA who represent individuals before the ICC communicate with clients and witnesses located in the Sudan and the Democratic Republic of Congo. ICDAA's members' communications with clients, clients' families, witnesses, journalists, human rights organizations, experts, investigators, and foreign government officials are vital to their effective representation of their clients.

76. Because of the content of its members' communications, the identity of those with whom they communicate, and the geographic location of individuals with whom they communicate, ICDAA reasonably believes that its members' communications will be monitored under the challenged law.

77. ICDAA's members have an ethical obligation to protect the confidentiality of their clients' information, including information covered by the attorney-client privilege. However, the challenged law makes it nearly impossible to ensure that their international email and telephone communications are secure. The law requires the attorneys to take burdensome and costly steps to gather information necessary for the effective representation of their clients in a manner that ensures those communications remain confidential. In

some cases, attorneys will have to gather information in person that they would otherwise have been able to gather by telephone or email. In email and telephone communications, attorneys will be forced to weigh the utility of asking for additional information against the risk that the communication will be acquired by the U.S. government.

The Nation Magazine

78. The Nation Magazine, an independent weekly journal published by The Nation Company, L.P. in New York City, is a critical, independent voice in American journalism. It publishes writing by regular contributors based in Europe, the Middle East, Latin America, Asia, and Africa. Its journalists report on a wide range of issues relating to international affairs, including the wars in Iraq and Afghanistan, the Israel-Palestine conflict, protest activities in China, and civil wars and other conflicts in Africa and Latin America.

79. Because of the nature of their work, The Nation's editors, columnists, and contributors often engage in telephone and email communications with individuals outside the United States. These communications are vital to providing up-to-date, accurate information about emerging news stories and informing longer-range analytic articles on international topics. Some of the information exchanged by The Nation's editors, columnists, and contributors through these communications constitutes "foreign intelligence information" as defined by the challenged law. For example, the Nation's staff members and contributing journalists communicate by telephone or email with political dissidents in other countries, foreign journalists in conflict zones, representatives of foreign governments, and individuals with

connections to disfavored political and social groups. Some of these communications relate to the involvement or alleged involvement of the U.S. government or its allies abroad, or of the U.S. military and its contractors, in repression and human rights abuses. Some of these communications relate to the subjects of terrorism, counterterrorism, or the foreign affairs of the United States.

80. Nation contributor Christopher Hedges has written extensively about violent conflicts and terrorism. In developing his articles, Mr. Hedges communicates with sources in countries such as Palestine, Iran, Syria, and Sudan. These communications, which include the exchange of information about terrorism, counterterrorism, and U.S. foreign affairs, are critical to his work. Nation contributor Naomi Klein has written extensively about the extension of radical free-market capitalism and the resurgence of imperial militarism following the September 11 attacks. In developing her articles, Ms. Klein routinely communicates with sources in Iraq, Argentina, Chile, Mexico and Colombia. She has communicated with journalists, political activists, human rights campaigners, members of indigenous resistance movements, and foreign government officials who have been targeted by the U.S. government or its allies. These communications, which include the exchange of information about state repression, resistance strategies, and the foreign affairs of the United States, are critical to her work.

81. Because of the nature of its contributors' communications and the identity and location of those with whom they communicate, The Nation reasonably be-

lieves that its contributors' communications will be monitored under the challenged law.

82. The challenged law undermines the ability of The Nation's editors, writers, contributors, and staff to gather information that is critical to their work. The ability to communicate confidentially with sources is essential to journalists' work. Many of the people with whom The Nation's staff and contributors communicate will not share information if they believe that their identities cannot be kept confidential. Some of them fear retribution by their own governments; others fear retribution by the U.S. government; still others fear persecution at the hands of terrorist groups. The risk that their identities will be revealed will lead some sources who otherwise would have shared information to decline to do so.

83. The challenged law will force The Nation's writers and contributors to gather information in person that could otherwise have been gathered by telephone or email. This means that The Nation's journalists will obtain some information later than they would otherwise have obtained it, which will affect their ability to report news in a timely fashion. It also means that they will not have access to some information that they might otherwise have been able to access. The costs associated with gathering information in person are also significant. Overseas travel is expensive and time-consuming. The additional costs will compromise the ability of The Nation's writers and contributors to gather information in a timely fashion and to convey critical information to The Nation's readership.

PEN

84. PEN American Center is an association based in New York City of approximately 3,300 authors, editors, and translators committed to the advancement of literature and the unimpeded flow of ideas and information. It is the largest of the 145 centers of International PEN. PEN fulfills its mission and supports its members through conferences, readings, public forums, advocacy campaigns, and direct support to endangered writers around the world. PEN is also a member of the International Freedom of Expression Exchange, a global network of non-governmental organizations that monitors free expression violations and defends journalists, writers, human rights activists, and Internet users who are persecuted for exercising their right to freedom of expression.

85. One of PEN's core projects is to ensure that writers across the world are free to write and to express their ideas. In 2006 alone, PEN followed the cases of 1,010 writers in ninety-eight countries who were imprisoned, censored, or threatened for their work. In support of these efforts, PEN staff members based in New York regularly engage in email and telephone communications with writers, advocates, and other PEN partners in countries such as Cuba, Mexico, Tunisia, Democratic Republic of Congo, Turkey, Uzbekistan, Syria, and China. Some of these communications include "foreign intelligence information" as defined by the challenged law. For example, in the course of gathering information about a particular person or case, PEN staff members communicate with individuals abroad about political context, security concerns, and advocacy options. Similarly, in the course of its efforts to support writers

facing persecution in countries where anti-terrorism and national security laws are used to target political dissidents and suppress freedom of expression, PEN staff and volunteer members communicate with targeted writers, their families, and human rights activists to coordinate advocacy efforts and provide humanitarian assistance.

86. As the U.S. center for an international organization that advocates for free expression, PEN relies on international email and telephone communications to keep abreast of developing issues, communicate strategy responses, and coordinate emergency support for individuals who have been imprisoned.

87. PEN relies on confidential international email and telephone communications to carry out its human-rights and free-expression advocacy around the world. Many of the individuals PEN seeks to assist have been monitored, imprisoned, or persecuted in their own countries. It takes months to establish the trust and rapport necessary for these individuals to communicate with PEN staff or volunteers about their own cases and the country context in which they work and live. Some of these individuals are living "and working in countries where a history of cooperation between their governments and U.S. intelligence services has left a legacy of fear and distrust of the United States. The threat that these communications will be monitored by the U.S. government under the challenged law will result in fewer individuals reaching out to PEN.

88. As the largest center of International PEN, a federation of 145 PEN Centers in 105 countries, PEN plays a prominent role in efforts to develop and expand International PEN's presence and impact around the

globe. PEN advises and mentors other PEN centers in Africa, Latin American [*sic*], and Asia, helps PEN centers in the developing world create and implement projects, and assists in raising funds to support this work. PEN relies on international email and telephone communications to communicate with its international counterparts and coordinate its center development efforts. The ability of PEN to conduct its center development program credibly and safely depends on maintaining the trust of participating centers that it is operating independent of the U.S. government and free from U.S. government scrutiny. The threat that PEN's communications with its international partners will be monitored by the U.S. government under the challenged law will undermine the trust necessary to cultivate successful partnerships and will deter some of PEN's international partners from participating in the center development program.

89. As an organization dedicated to promoting a free exchange of information and ideas around the world, PEN also convenes discussions, dialogues, and debates featuring writers and intellectuals from around the world. For example, PEN stages an annual World Voices Literary Festival in New York City, during which between fifty and one hundred international writers participate in more than sixty public programs with their American counterparts. Among those PEN recruits to participate in these events are writers and intellectuals who hold controversial and challenging views, dissident writers, and even writers the U.S. government has attempted to exclude from the country for ideological reasons. PEN extends invitations and negotiates the participation of international writers and intellectuals at PEN events through email and telephone communica-

tions. The threat that these communications might be monitored under the challenged law will inhibit writers whose views might be deemed controversial in the United States or by the U.S. government from discussing their participation and ultimately discourage their attendance at PEN events.

Service Employees International Union

90. The Service Employees International Union is the fastest-growing labor organization in the Americas, representing two million members in a variety of occupations and industries covering three sectors: property services, public services, and health care. SEIU is the nation's largest health care union, the largest property services union, and the second-largest public employees union. While SEIU members are located throughout the United States, Puerto Rico, and Canada, SEIU works together with labor unions and human rights organizations around the world to improve the standard of living for working people on a global scale.

91. To complement its U.S.-based work, SEIU employs full-time staff in Switzerland, the Netherlands, United Kingdom, Australia, Uruguay, and Brazil. It also partners with organizations in more than forty other countries. In addition to places where it has staff, SEIU focuses considerable international activity in Poland, China, and several countries in Southern Africa including Malawi. With its partners, SEIU crafts global alliances to address worker and human rights issues at global employers and to help workers in both the United States and abroad to attain workplace justice and to pursue mutual interests. To achieve these ends, SEIU staff routinely communicate by email and telephone with individuals, including labor union activists, outside the

United States. Some of these communications include "foreign intelligence information" as defined by the challenged law. For example, SEIU staff communicate with academics, non-governmental organizations, and labor union officials in Colombia, China, and Russia regarding workers' right to organize and fair labor standards. Some of these communications relate to the foreign affairs of the United States.

92. Because of the nature and content of its staff members' communications, the identity of those with whom they communicate, and the geographic location of individuals with whom they communicate, SEIU reasonably believes that its staff members' communications will be monitored under the challenged law.

93. The challenged law undermines the ability of SEIU staff and leaders to gather information that is critical to their work. Some of the people from whom SEIU staff obtain information are labor activists who are persecuted by their own governments or by non-governmental groups. These individuals will not share information with SEIU if they believe that their identities cannot be kept confidential. Labor activists in Colombia, Zimbabwe, and Russia, for example, operate in extremely repressive environments, and they must often operate in secret. Labor activists who believe that their communications with SEIU could be acquired by the U.S. government (and perhaps turned over to their own governments) will be more cautious about the information they share and in some cases may decide that working with SEIU is simply too risky.

Washington Office on Latin America

94. The Washington Office on Latin America is a non-profit, non-governmental organization based in

Washington, D.C. Founded in 1974, WOLA conducts research, education, and advocacy designed to foster human rights, democracy, and social justice in Latin America with a focus on the impact of U.S. foreign policy in the region. WOLA is regularly called upon for its research and analysis by policymakers, the media, and academics in the United States and Latin America. WOLA does direct advocacy with the U.S. and foreign governments pertaining to the impact of U.S. foreign policy on human rights and democracy in Latin America.

95. Because of the nature of its staff members' communications and the identity and location of those with whom they communicate, WOLA reasonably believes that its staff members' communications will be monitored under the challenged law. In connection with its work relating to drug policy, youth gang violence, organized crime, rights and development, and security policy, WOLA's staff routinely engage in email and telephone communications with activists, policy makers, government representatives, journalists, and academics outside the United States. Some of these communications include "foreign intelligence information" as defined in the challenged law. For example, WOLA's drug-policy program, which monitors the impact of U.S. international drug control policy on democracy and human rights in Latin American countries including Colombia and Mexico, sometimes requires WOLA staff to communicate with individuals who have been accused by their own governments or by political opponents of being guerrillas or terrorists, or of having links to such organizations. Some of WOLA's communications with these individuals relate to drug control policy and the foreign affairs of the United States.

96. The challenged law undermines the ability of WOLA to gather information that is necessary to its work. For example, the challenged law will undermine the ability of Maureen Meyer, WOLA's Associate for Mexico and Central America, to gather information about human rights, democracy, and social justice in El Salvador. Ms. Meyer's work requires her to communicate with human rights groups, labor leaders, opposition figures, protest organizers, attorneys and other political actors in El Salvador. Some of Ms. Meyer's communications are extremely sensitive because of the high levels of political tension in the country. Likewise, some of the individuals she works with have been accused of "terrorism" under El Salvador's anti-terror law. These communications are sensitive because the individuals contacted by WOLA fear persecution due to their political activities. Any risk that confidentiality will be compromised will discourage political activists from sharing information with WOLA, especially if there is a perceived risk that information obtained by the United States will be shared with the government of El Salvador. If WOLA cannot ensure the confidentiality of its communications, its education and advocacy work in El Salvador and in other countries where social protest has been criminalized will be compromised. The challenged law will also undermine the ability of John Walsh, WOLA's Senior Associate for the Andes and Drug Policy, to gather information about human rights and democratic governance in Venezuela. WOLA's Venezuala [*sic*] program, which is intended to promote dialogue in a political environment that has become polarized, requires that WOLA be and be seen as independent from any government. WOLA has worked for more than thirty years to build the trust and confidence that it now enjoys. In an

atmosphere of mutual hostility between the U.S. and Venezuelan governments, however, in which harsh rhetoric on both sides has aggravated an already-contentious political climate, the mere suspicion that information provided in confidence to WOLA staff will be accessed by the U.S. government will seriously affect WOLA's credibility and effectiveness. Even if WOLA makes clear its opposition to the unwarranted monitoring of its communications by the government, some individuals who would otherwise have worked with WOLA and shared information with WOLA will decline to do so because of the danger that their private communications will be intercepted.

Attorneys

97. Daniel N. Arshack, David Nevin, Scott McKay, and Sylvia Royce (collectively, "Attorneys") are attorneys based in the United States. They engage in sensitive and privileged communications by telephone and email with individuals outside of the United States, including clients, their families, witnesses, journalists, human rights organizations, experts, investigators, and foreign government officials. These communications are vital to their effective representation of their clients. Some of the information that the Attorneys communicate by telephone and email is "foreign intelligence information" as defined in the challenged law.

98. Because of the nature of their communications and the identities and location of those with whom they communicate, the Attorneys reasonably believe that their communications will be monitored under the challenged law.

99. The Attorneys have an ethical obligation to protect the confidentiality of their clients' information, in-

cluding information covered by the attorney-client privilege. However, the challenged law makes it nearly impossible to ensure that their international email and telephone communications are secure. The law requires the Attorneys to take burdensome and costly steps to gather information necessary for the effective representation of their clients in a manner that ensures those communications remain confidential. The law will require the attorneys to minimize the amount of sensitive or privileged information they communicate by telephone or email. Some of the Attorneys will travel abroad to obtain information they would otherwise have been able to obtain by telephone or email.

100. The challenged law also reduces the likelihood that clients, witnesses, sources, and experts will be willing to share information by telephone or email that is necessary to provide effective representation to their clients. The Attorneys believe that the real risk that their communications will be intercepted undermines their ability to represent their clients and prejudices or will prejudice their clients in ongoing and anticipated legal proceedings.

101. Attorney Daniel N. Arshack is a founding partner of the law firm Arshack, Hajek and Lehrman, PLLC located in New York City. His practice includes the representation of civil litigants, individuals, and businesses not yet charged with crimes; criminal defendants; and witnesses in criminal cases domestically and in international criminal tribunals throughout the world. As part of his legal practice, Mr. Arshack engages in frequent confidential international communications by both telephone and email with clients, their families, witnesses, journalists, hurnan rights organizations, experts, inves-

tigators, and foreign government officials. Some of the countries Mr. Arshack regularly calls and emails include Cambodia, France, Japan, Sierra Leone, Turkey, Uganda, Kenya, Liberia, Lebanon, Israel, Mexico, Argentina, Bolivia, Ecuador, and Saudi Arabia. Because the challenged law increases the risk that his international communications will be monitored by the U.S. government, Mr. Arshack will be forced to gather some information in person that he would otherwise have been able to gather over the telephone or by email.

102. Attorneys Scott McKay and David Nevin are partners at the law firm Nevin, Benjamin, McKay & Bartlett LLP located in Boise, Idaho. As part of their criminal-defense practice, Mr. McKay and Mr. Nevin have represented and continue to represent individuals who have been accused by the federal government of terrorism-related crimes or who have been accused of having a link to terrorists or terrorist organizations. For example, Mr. McKay and Mr. Nevin were defense counsel for Sami Al-Hussayen, an individual the government unsuccessfully prosecuted for providing material support to terrorism. Mr. McKay and Mr. Nevin continue to represent Mr. Al-Hussayen in a civil suit arising from the September 11, 2001 terrorist attacks, in which Mr. Al-Hussayen has been named as a defendant. Their representation of Mr. Al-Hussayen has required and will continue to require them to communicate by telephone and email with witnesses, many of whom reside in Saudi Arabia, and with Mr. Al-Hussayen, who returned to Saudi Arabia following his acquittal. Mr. McKay and Mr. Nevin have also offered to represent Khalid Sheikh Mohammed, one of the five prisoners who have been charged with capital offenses before the military commissions at Guantanamo Bay. Mr. McKay and Mr.

Nevin have met with Mr. Mohammed at Guantanamo Bay on several occasions since June 3, 2008. They have communicated about Mr. Mohammed's case, or will need to communicate in the future about his case, with journalists, human rights organizations, experts, investigators, witnesses and others, some of whom are located outside the United States. Some of their communications relate to terrorism, counterterrorism, and the foreign affairs of the United States. The challenged law will require Mr. McKay and Mr. Nevin to refrain from engaging in certain sensitive or privileged communications by telephone or email. It will also require them to gather certain information vital to the representation of their clients in person rather than by telephone or email.

103. Attorney Sylvia Royce is a former Assistant U.S. Attorney for the District of Colombia and the former Chief of International Prisoner Transfer at the U.S. Department of Justice. Ms. Royce's private practice includes the representation of individuals imprisoned in the United States who are seeking to be transferred to their home countries to serve out the remainder of their prison sentences. Ms. Royce also represents Mohamedou Ould Slahi, a prisoner who is held at Guantanamo Bay as an enemy combatant. In connection with her representation of Mr. Slahi, Ms. Royce frequently communicates by email and telephone with co-counsel in France and Mauritania. These communications include sensitive information relating to the litigation of Mr. Slahi's habeas petition and Freedom of Information Act case. Ms. Royce also frequently communicates with foreign journalists working for print media such as *Der Spiegel* and the Toronto *Globe and Mail*, and with human rights organizations outside the United States. These communications relate to, among other things, the

detention center at Guantanamo Bay, the policies of the U.S. government relating to the detention and interrogation of enemy combatants, the connections or lack thereof between her client and others held at Guantanamo, and the propriety or impropriety of government decisions with respect to classification of national security information. Many of these communications relate to terrorism, counterterrorism, and the foreign affairs of the United States. The challenged law will require Ms. Royce to refrain from engaging in certain sensitive or privileged communications by telephone or email. It will prevent her from gathering some information that is critical to her representation of her clients.

CAUSES OF ACTION

104. The challenged law violates the Fourth Amendment because it authorizes defendants to acquire the constitutionally protected communications of U.S. citizens and residents without identifying the people to be surveilled; without specifying the facilities, places, premises, or property to be monitored; without observing meaningful limitations on the retention, analysis, and dissemination of acquired information; without obtaining individualized warrants based on criminal or foreign intelligence probable cause; and without making prior administrative determinations that the targets of surveillance are foreign agents or connected in any way, however tenuously, to terrorism.

105. The challenged law violates the First Amendment by substantially burdening a broad range of lawful expressive activity without adequate justification and by authorizing defendants to acquire constitutionally protected communications without meaningful judicial oversight.

106. The challenged law violates Article III by requiring the FISC to rule on questions that do not constitute cases or controversies.

107. The challenged law violates the principle of separation of powers by allowing the government to continue surveillance activities even if the FISC has held those activities be [*sic*] illegal.

PRAYER FOR RELIEF

WHEREFORE plaintiffs respectfully requests that the Court:

108. Declare that section 702 of the FISA Amendments Act is unconstitutional under the First and Fourth Amendments, under Article III, and under the principle of separation of powers;

109. Permanently enjoin defendants from conducting surveillance pursuant to the authority granted by section 702 of the FISA Amendments Act;

110. Award Plaintiff fees and costs pursuant to 28 U.S.C. § 2412;

111. Grant such other and further relief as the Court deems just and proper.

/s/ JAMEEL JAFFER
JAMEEL JAFFER
MELISSA GOODMAN (MG-7844)
L. DANIELLE TULLY (DT-0509)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

New York Civil Liberties Union
Foundation, by
CHRISTOPHER DUNN (CD-3991)
ARTHUR EISENBERG (AE-2012)
New York Civil Liberties Union
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300

July 10, 2008

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Sept. 12, 2008

DECLARATION OF JAMEEL JAFFER

I, Jameel Jaffer, declare:

1. I am a resident of Brooklyn, New York over the age of 18. I have personal knowledge of the facts stated in this declaration.

2. I am an attorney for the American Civil Liberties Union and counsel to plaintiffs in this action. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment.

3. Attached hereto as **Exhibit A** is *Bush Lets U.S. Spy on Callers Without Courts*, New York Times, December 16, 2005. The article reports that, in 2002, President George W. Bush secretly authorized the National Security Agency to inaugurate a program of warrantless surveillance inside the United States.

4. Attached hereto as **Exhibit B** is a transcript of a radio address delivered by President George W. Bush on December 17, 2005, in which the President stated: "In the weeks following the terrorist attacks on our Nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaida and related terrorist organizations."

5. Attached hereto as **Exhibit C** is a transcript of a news conference held by President Bush on December 19, 2005, during which President Bush stated: "I've reauthorized this program more than 30 times since the September the 11th attacks. . . . "

6. Attached hereto as **Exhibit D** is a transcript of a press briefing held by then-Attorney General Alberto Gonzales and then-Deputy Director of National Intelligence Michael Hayden on December 19, 2005, during which Attorney General Gonzales stated: "The Presi-

dent has authorized a program to engage in electronic surveillance of a particular kind, and this would be the intercepts of contents of communications where one of the—one party to the communication is outside the United States." During the same press briefing, General Hayden stated that targeting determinations under the Program were "made by the operational work force at the National Security Agency using the information available to them at the time, and the standard that they apply—and it's a two-person standard that must be signed off by a shift supervisor, and carefully recorded as to what created the operational imperative to cover any target, but particularly with regard to those inside the United States."

7. Attached hereto as **Exhibit E** is a transcript of an address to the National Press Club delivered by General Hayden on January 23, 2006 in which General Hayden stated that, under the program authorized by the President, the NSA intercepted "calls . . . [the government has] a reasonable basis to believe involve al Qaeda or one of its affiliates."

8. Attached hereto as **Exhibit F** is a letter sent from Attorney General Gonzales to Senators Patrick Leahy and Arlen Specter on January 17, 2007, in which Attorney General Gonzales wrote that the FISC had issued orders in January 2007 that authorized the Government to "target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization."

9. Attached hereto as **Exhibit G** is a transcript of a an interview conducted by the *El Paso Times* with DNI

Michael McConnell on August 22, 2007, in which DNI McConnell indicated that the January 2007 FISC orders subjected any electronic surveillance that was occurring as part of the Program to the approval of the Foreign Intelligence Surveillance Court. In the same interview, DNI McConnell indicated that the FISC modified the January 2007 orders in the spring of 2007, reportedly narrowing the authority that the FISC had extended to the executive branch in January.

10. Attached hereto as **Exhibit H** is *A Law Terrorism Outran: We Need a FISA for the 21st Century,* a *Washington Post* op-ed piece written by DNI McConnell and published on May 21, 2007, in which DNI McConnell states that, following the FISC's modification of its January 2007 orders, he had appealed to Congress to amend FISA.

I declare under penalty of perjury under the laws of the United States and of the State of New York that the foregoing is true and correct.

/s/ JAMEEL JAFFER
JAMEEL JAFFER

Executed at New York, New York, on September 11, 2008.

EXHIBIT A

The New York Times
nytimes.com

December 16, 2005

Bush Lets U.S. Spy on Callers Without Courts

By JAMES RISEN and ERIC LICHTBLAU

Correction Appended

WASHINGTON, Dec. 15—Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials.

Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said. The agency, they said, still seeks warrants to monitor entirely domestic communications.

The previously undisclosed decision to permit some eavesdropping inside the country without court approval was a major shift in American intelligence-gathering practices, particularly for the National Security Agency, whose mission is to spy on communications abroad. As a result, some officials familiar with the continuing oper-

ation have questioned whether the surveillance has stretched, if not crossed, constitutional limits on legal searches.

"This is really a sea change," said a former senior official who specializes in national security law. "It's almost a mainstay of this country that the N.S.A. only does foreign searches."

Nearly a dozen current and former officials, who were granted anonymity because of the classified nature of the program, discussed it with reporters for The New York Times because of their concerns about the operation's legality and oversight.

According to those officials and others, reservations about aspects of the program have also been expressed by Senator John D. Rockefeller IV, the West Virginia Democrat who is the vice chairman of the Senate Intelligence Committee, and a judge presiding over a secret court that oversees intelligence matters. Some of the questions about the agency's new powers led the administration to temporarily suspend the operation last year and impose more restrictions, the officials said.

The Bush administration views the operation as necessary so that the agency can move quickly to monitor communications that may disclose threats to the United States, the officials said. Defenders of the program say it has been a critical tool in helping disrupt terrorist plots and prevent attacks inside the United States.

Administration officials are confident that existing safeguards are sufficient to protect the privacy and civil liberties of Americans, the officials say. In some cases, they said, the Justice Department eventually seeks war-

rants if it wants to expand the eavesdropping to include communications confined within the United States. The officials said the administration had briefed Congressional leaders about the program and notified the judge in charge of the Foreign Intelligence Surveillance Court, the secret Washington court that deals with national security issues.

The White House asked The New York Times not to publish this article, arguing that it could jeopardize continuing investigations and alert would-be terrorists that they might be under scrutiny. After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.

Dealing With a New Threat

While many details about the program remain secret, officials familiar with it say the N.S.A. eavesdrops without warrants on up to 500 people in the United States at any given time. The list changes as some names are added and others dropped, so the number monitored in this country may have reached into the thousands since the program began, several officials said. Overseas, about 5,000 to 7,000 people suspected of terrorist ties are monitored at one time, according to those officials.

Several officials said the eavesdropping program had helped uncover a plot by Iyman Faris, an Ohio trucker and naturalized citizen who pleaded guilty in 2003 to supporting Al Qaeda by planning to bring down the Brooklyn Bridge with blowtorches. What appeared to be another Qaeda plot, involving fertilizer bomb attacks

on British pubs and train stations, was exposed last year in part through the program, the officials said. But they said most people targeted for N.S.A. monitoring have never been charged with a crime, including an Iranian-American doctor in the South who came under suspicion because of what one official described as dubious ties to Osama bin Laden.

The eavesdropping program grew out of concerns after the Sept. 11 attacks that the nation's intelligence agencies were not poised to deal effectively with the new threat of Al Qaeda and that they were handcuffed by legal and bureaucratic restrictions better suited to peacetime than war, according to officials. In response, President Bush significantly eased limits on American intelligence and law enforcement agencies and the military.

But some of the administration's antiterrorism initiatives have provoked an outcry from members of Congress, watchdog groups, immigrants and others who argue that the measures erode protections for civil liberties and intrude on Americans' privacy.

Opponents have challenged provisions of the USA Patriot Act, the focus of contentious debate on Capitol Hill this week, that expand domestic surveillance by giving the Federal Bureau of Investigation more power to collect information like library lending lists or Internet use. Military and F.B.I. officials have drawn criticism for monitoring what were largely peaceful antiwar protests. The Pentagon and the Department of Homeland Security were forced to retreat on plans to use public and private databases to hunt for possible terrorists. And last year, the Supreme Court rejected the adminis-

tration's claim that those labeled "enemy combatants" were not entitled to judicial review of their open-ended detention.

Mr. Bush's executive order allowing some warrantless eavesdropping on those inside the United States—including American citizens, permanent legal residents, tourists and other foreigners—is based on classified legal opinions that assert that the president has broad powers to order such searches, derived in part from the September 2001 Congressional resolution authorizing him to wage war on Al Qaeda and other terrorist groups, according to the officials familiar with the N.S.A. operation.

The National Security Agency, which is based at Fort Meade, Md., is the nation's largest and most secretive intelligence agency, so intent on remaining out of public view that it has long been nicknamed "No Such Agency." It breaks codes and maintains listening posts around the world to eavesdrop on foreign governments, diplomats and trade negotiators as well as drug lords and terrorists. But the agency ordinarily operates under tight restrictions on any spying on Americans, even if they are overseas, or disseminating information about them.

What the agency calls a "special collection program" began soon after the Sept. 11 attacks, as it looked for new tools to attack terrorism. The program accelerated in early 2002 after the Central Intelligence Agency started capturing top Qaeda operatives overseas, including Abu Zubaydah, who was arrested in Pakistan in March 2002. The C.I.A. seized the terrorists' computers, cellphones and personal phone directories, said the officials familiar with the program. The N.S.A. surveil-

lance was intended to exploit those numbers and addresses as quickly as possible, they said.

In addition to eavesdropping on those numbers and reading e-mail messages to and from the Qaeda figures, the N.S.A. began monitoring others linked to them, creating an expanding chain. While most of the numbers and addresses were overseas, hundreds were in the United States, the officials said.

Under the agency's longstanding rules, the N.S.A. can target for interception phone calls or e-mail messages on foreign soil, even if the recipients of those communications are in the United States. Usually, though, the government can only target phones and e-mail messages in the United States by first obtaining a court order from the Foreign Intelligence Surveillance Court, which holds its closed sessions at the Justice Department.

Traditionally, the F.B.I., not the N.S.A., seeks such warrants and conducts most domestic eavesdropping. Until the new program began, the N.S.A. typically limited its domestic surveillance to foreign embassies and missions in Washington, New York and other cities, and obtained court orders to do so.

Since 2002, the agency has been conducting some warrantless eavesdropping on people in the United States who are linked, even if indirectly, to suspected terrorists through the chain of phone numbers and e-mail addresses, according to several officials who know of the operation. Under the special program, the agency monitors their international communications, the officials said. The agency, for example, can target phone calls from someone in New York to someone in Afghanistan.

Warrants are still required for eavesdropping on entirely domestic-to-domestic communications, those officials say, meaning that calls from that New Yorker to someone in California could not be monitored without first going to the Federal Intelligence Surveillance Court.

A White House Briefing

After the special program started, Congressional leaders from both political parties were brought to Vice President Dick Cheney's office in the White House. The leaders, who included the chairmen and ranking members of the Senate and House intelligence committees, learned of the N.S.A. operation from Mr. Cheney, Lt. Gen. Michael V. Hayden of the Air Force, who was then the agency's director and is now a full general and the principal deputy director of national intelligence, and George J. Tenet, then the director of the C.I.A., officials said.

It is not clear how much the members of Congress were told about the presidential order and the eavesdropping program. Some of them declined to comment about the matter, while others did not return phone calls.

Later briefings were held for members of Congress as they assumed leadership roles on the intelligence committees, officials familiar with the program said. After a 2003 briefing, Senator Rockefeller, the West Virginia Democrat who became vice chairman of the Senate Intelligence Committee that year, wrote a letter to Mr. Cheney expressing concerns about the program, officials knowledgeable about the letter said. It could not be determined if he received a reply. Mr. Rockefeller declined to comment. Aside from the Congressional lead-

ers, only a small group of people, including several cabinet members and officials at the N.S.A., the C.I.A. and the Justice Department, know of the program.

Some officials familiar with it say they consider warrantless eavesdropping inside the United States to be unlawful and possibly unconstitutional, amounting to an improper search. One government official involved in the operation said he privately complained to a Congressional official about his doubts about the program's legality. But nothing came of his inquiry. "People just looked the other way because they didn't want to know what was going on," he said.

A senior government official recalled that he was taken aback when he first learned of the operation. "My first reaction was, 'We're doing what?'" he said. While he said he eventually felt that adequate safeguards were put in place, he added that questions about the program's legitimacy were understandable.

Some of those who object to the operation argue that is unnecessary. By getting warrants through the foreign intelligence court, the N.S.A. and F.B.I. could eavesdrop on people inside the United States who might be tied to terrorist groups without skirting longstanding rules, they say.

The standard of proof required to obtain a warrant from the Foreign Intelligence Surveillance Court is generally considered lower than that required for a criminal warrant—intelligence officials only have to show probable cause that someone may be "an agent of a foreign power," which includes international terrorist groups—and the secret court has turned down only a small number of requests over the years. In 2004, according to the Jus-

tice Department, 1,754 warrants were approved. And the Foreign Intelligence Surveillance Court can grant emergency approval for wiretaps within hours, officials say.

Administration officials counter that they sometimes need to move more urgently, the officials said. Those involved in the program also said that the N.S.A.'s eavesdroppers might need to start monitoring large batches of numbers all at once, and that it would be impractical to seek permission from the Foreign Intelligence Surveillance Court first, according to the officials.

The N.S.A. domestic spying operation has stirred such controversy among some national security officials in part because of the agency's cautious culture and long-standing rules.

Widespread abuses—including eavesdropping on Vietnam War protesters and civil rights activists—by American intelligence agencies became public in the 1970's and led to passage of the Foreign Intelligence Surveillance Act, which imposed strict limits on intelligence gathering on American soil. Among other things, the law required search warrants, approved by the secret F.I.S.A. court, for wiretaps in national security cases. The agency, deeply scarred by the scandals, adopted additional rules that all but ended domestic spying on its part.

After the Sept. 11 attacks, though, the United States intelligence community was criticized for being too risk-averse. The National Security Agency was even cited by the independent 9/11 Commission for adhering to self-imposed rules that were stricter than those set by federal law.

Concerns and Revisions

Several senior government officials say that when the special operation began, there were few controls on it and little formal oversight outside the N.S.A. The agency can choose its eavesdropping targets and does not have to seek approval from Justice Department or other Bush administration officials. Some agency officials wanted nothing to do with the program, apparently fearful of participating in an illegal operation, a former senior Bush administration official said. Before the 2004 election, the official said, some N.S.A. personnel worried that the program might come under scrutiny by Congressional or criminal investigators if Senator John Kerry, the Democratic nominee, was elected president.

In mid-2004, concerns about the program expressed by national security officials, government lawyers and a judge prompted the Bush administration to suspend elements of the program and revamp it.

For the first time, the Justice Department audited the N.S.A. program, several officials said. And to provide more guidance, the Justice Department and the agency expanded and refined a checklist to follow in deciding whether probable cause existed to start monitoring someone's communications, several officials said.

A complaint from Judge Colleen Kollar-Kotelly, the federal judge who oversees the Federal Intelligence Surveillance Court, helped spur the suspension, officials said. The judge questioned whether information obtained under the N.S.A. program was being improperly used as the basis for F.I.S.A. wiretap warrant requests from the Justice Department, according to senior government officials. While not knowing all the details of

the exchange, several government lawyers said there appeared to be concerns that the Justice Department, by trying to shield the existence of the N.S.A. program, was in danger of misleading the court about the origins of the information cited to justify the warrants.

One official familiar with the episode said the judge insisted to Justice Department lawyers at one point that any material gathered under the special N.S.A. program not be used in seeking wiretap warrants from her court. Judge Kollar-Kotelly did not return calls for comment.

A related issue arose in a case in which the F.B.I. was monitoring the communications of a terrorist suspect under a F.I.S.A.-approved warrant, even though the National Security Agency was already conducting warrantless eavesdropping.

According to officials, F.B.I. surveillance of Mr. Faris, the Brooklyn Bridge plotter, was dropped for a short time because of technical problems. At the time, senior Justice Department officials worried what would happen if the N.S.A. picked up information that needed to be presented in court. The government would then either have to disclose the N.S.A. program or mislead a criminal court about how it had gotten the information.

Several national security officials say the powers granted the N.S.A. by President Bush go far beyond the expanded counterterrorism powers granted by Congress under the USA Patriot Act, which is up for renewal. The House on Wednesday approved a plan to reauthorize crucial parts of the law. But final passage has been delayed under the threat of a Senate filibuster because of concerns from both parties over possible intrusions on Americans' civil liberties and privacy.

Under the act, law enforcement and intelligence officials are still required to seek a F.I.S.A. warrant every time they want to eavesdrop within the United States. A recent agreement reached by Republican leaders and the Bush administration would modify the standard for F.B.I. wiretap warrants, requiring, for instance, a description of a specific target. Critics say the bar would remain too low to prevent abuses.

Bush administration officials argue that the civil liberties concerns are unfounded, and they say pointedly that the Patriot Act has not freed the N.S.A. to target Americans. "Nothing could be further from the truth," wrote John Yoo, a former official in the Justice Department's Office of Legal Counsel, and his co-author in a Wall Street Journal opinion article in December 2003. Mr. Yoo worked on a classified legal opinion on the N.S.A.'s domestic eavesdropping program.

At an April hearing on the Patriot Act renewal, Senator Barbara A. Mikulski, Democrat of Maryland, asked Attorney General Alberto R. Gonzales and Robert S. Mueller III, the director of the F.B.I., "Can the National Security Agency, the great electronic snooper, spy on the American people?"

"Generally," Mr. Mueller said, "I would say generally, they are not allowed to spy or to gather information on American citizens."

President Bush did not ask Congress to include provisions for the N.S.A. domestic surveillance program as part of the Patriot Act and has not sought any other laws to authorize the operation. Bush administration lawyers argued that such new laws were unnecessary, because they believed that the Congressional resolution

on the campaign against terrorism provided ample authorization, officials said.

The Legal Line Shifts

Seeking Congressional approval was also viewed as politically risky because the proposal would be certain to face intense opposition on civil liberties grounds. The administration also feared that by publicly disclosing the existence of the operation, its usefulness in tracking terrorists would end, officials said.

The legal opinions that support the N.S.A. operation remain classified, but they appear to have followed private discussions among senior administration lawyers and other officials about the need to pursue aggressive strategies that once may have been seen as crossing a legal line, according to senior officials who participated in the discussions.

For example, just days after the Sept. 11, 2001, attacks on New York and the Pentagon, Mr. Yoo, the Justice Department lawyer, wrote an internal memorandum that argued that the government might use "electronic surveillance techniques and equipment that are more powerful and sophisticated than those available to law enforcement agencies in order to intercept telephonic communications and observe the movement of persons but without obtaining warrants for such uses."

Mr. Yoo noted that while such actions could raise constitutional issues, in the face of devastating terrorist attacks "the government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties."

The next year, Justice Department lawyers disclosed their thinking on the issue of warrantless wiretaps in national security cases in a little-noticed brief in an unrelated court case. In that 2002 brief, the government said that "the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority."

Administration officials were also encouraged by a November 2002 appeals court decision in an unrelated matter. The decision by the Foreign Intelligence Surveillance Court of Review, which sided with the administration in dismantling a bureaucratic "wall" limiting cooperation between prosecutors and intelligence officers, cited "the president's inherent constitutional authority to conduct warrantless foreign intelligence surveillance."

But the same court suggested that national security interests should not be grounds "to jettison the Fourth Amendment requirements" protecting the rights of Americans against undue searches. The dividing line, the court acknowledged, "is a very difficult one to administer."

Barclay Walsh contributed research for this article.

Correction: Dec. 28, 2005, Wednesday:

Because of an editing error, a front-page article on Dec. 16 about a decision by President Bush to authorize the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without warrants ordinarily

required for domestic spying misstated the name of the court that would normally issue those warrants. It is the Foreign—not Federal—Intelligence Surveillance Court.

EXHIBIT B

The President's Radio Address
December 17, 2005

Good morning. As President, I took an oath to defend the Constitution, and I have no greater responsibility than to protect our people, our freedom, and our way of life. On September the 11th, 2001, our freedom and way of life came under attack by brutal enemies who killed nearly 3,000 innocent Americans. We're fighting these enemies across the world. Yet in this first war of the 21st century, one of the most critical battlefronts is the homefront. And since September the 11th, we've been on the offensive against the terrorists plotting within our borders.

One of the first actions we took to protect America after our Nation was attacked was to ask Congress to pass the PATRIOT Act. The PATRIOT Act tore down the legal and bureaucratic wall that kept law enforcement and intelligence authorities from sharing vital information about terrorist threats. And the PATRIOT Act allowed Federal investigators to pursue terrorists with tools they already used against other criminals. Congress passed this law with a large, bipartisan majority, including a vote of 98-1 in the United States Senate.

Since then, America's law enforcement personnel have used this critical law to prosecute terrorist operatives and supporters and to break up terrorist cells in New York, Oregon, Virginia, California, Texas, and Ohio. The PATRIOT Act has accomplished exactly what it was designed to do: It has protected American liberty and saved American lives.

Yet key provisions of this law are set to expire in 2 weeks. The terrorist threat to our country will not expire in 2 weeks. The terrorists want to attack America again and inflict even greater damage than they did on September the 11th. Congress has a responsibility to ensure that law enforcement and intelligence officials have the tools they need to protect the American people.

The House of Representatives passed reauthorization of the PATRIOT Act. Yet a minority of Senators filibustered to block the renewal of the PATRIOT Act when it came up for a vote yesterday. That decision is irresponsible, and it endangers the lives of our [[Page 1881]] citizens. The Senators who are filibustering must stop their delaying tactics, and the Senate must vote to reauthorize the PATRIOT Act. In the war on terror, we cannot afford to be without this law for a single moment.

To fight the war on terror, I am using authority vested in me by Congress, including the Joint Authorization for Use of Military Force, which passed overwhelmingly in the first week after September the 11th. I'm also using constitutional authority vested in me as Commander in Chief.

In the weeks following the terrorist attacks on our Nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaida and related terrorist organizations. Before we intercept these communications, the Government must have information that establishes a clear link to these terrorist networks.

This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our

friends, and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country.

As the 9/11 Commission pointed out, it was clear that terrorists inside the United States were communicating with terrorists abroad before the September the 11th attacks, and the commission criticized our Nation's inability to uncover links between terrorists here at home and terrorists abroad. Two of the terrorist hijackers who flew a jet into the Pentagon, Nawaf al Hamzi and Khalid al Mihdhar, communicated while they were in the United States to other members of Al Qaida who were overseas. But we didn't know they were here until it was too late.

The authorization I gave the National Security Agency after September the 11th helped address that problem in a way that is fully consistent with my constitutional responsibilities and authorities. The activities I have authorized make it more likely that killers like these 9/11 hijackers will be identified and located in time. And the activities conducted under this authorization have helped detect and prevent possible terrorist attacks in the United States and abroad.

The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our Government and the threat of catastrophic damage to our homeland. During each assessment, pre-

vious activities under the authorization are reviewed. The review includes approval by our Nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our Nation faces a continuing threat from Al Qaida and related groups.

The NSA's activities under this authorization are thoroughly reviewed by the Justice Department and NSA's top legal officials, including NSA's General Counsel and Inspector General. Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it. Intelligence officials involved in this activity also receive extensive training to ensure they perform their duties consistent with the letter and intent of the authorization.

This authorization is a vital tool in our war against the terrorists. It is critical to saving American lives. The American people expect me to do everything in my power under our laws and constitution to protect them and their civil liberties. And that is exactly what I will continue to do, so long as I'm the President of the United States.

Thank you.

NOTE: The President spoke at 10:06 a.m. from the Roosevelt Room at the White House. In his address, he referred to the National Commission on Terrorist Attacks Upon the United States (9/11 Commission). The Office of the Press Secretary also released a Spanish language transcript of this address.

EXHIBIT C

The President's News Conference
December 19, 2005

The President. Welcome. Please be seated. Thanks.

Last night I addressed the Nation about our strategy for victory in Iraq and the historic elections that took place in the country last week. In a nation that once lived by the whims of a brutal dictator, the Iraqi people now enjoy constitutionally protected freedoms, and their leaders now derive their powers from the consent of the governed. Millions of Iraqis are looking forward to a future with hope and optimism.

The Iraqi people still face many challenges. This is the first time the Iraqis are forming a Government under their new Constitution. The Iraqi Constitution requires a two-thirds vote of the Parliament for certain top officials, so the formation of the new Government will take time as Iraqis work to build consensus. And once the new Iraqi Government assumes office, Iraq's new leaders will face many important decisions on issues such as security and reconstruction, economic reform, and national unity. The work ahead will require the patience of the Iraqi people and the patience and support of America and our coalition partners.

As I said last night, this election does not mean the end of violence, but it is the beginning of something new, a constitutional democracy at the heart of the Middle East. And we will keep working toward our goal of a democratic Iraq that can govern itself, sustain itself, and defend itself.

Our mission in Iraq is critical to victory in the global war on terror. After our country was attacked on Sep-

tember the 11th and nearly 3,000 lives were lost, I vowed to do everything within my power to bring justice to those who were responsible. I also pledged to the American people to do everything within my power to prevent this from happening again. What we quickly learned was that Al Qaida was not a conventional enemy. Some lived in our cities and communities and communicated from here in America to plot and plan with bin Laden's lieutenants in Afghanistan, Pakistan, and elsewhere. Then they boarded our airplanes and launched the worst attack on our country in our Nation's history.

This new threat required us to think and act differently. And as the 9/11 Commission pointed out, to prevent this from happening again, we need to connect the dots before the enemy attacks, not after. And we need to recognize that dealing with Al Qaida is not simply a matter of law enforcement; it requires defending the country against an enemy that declared war against the United States of America.

As President and Commander in Chief, I have the constitutional responsibility and the constitutional authority to protect our country. Article II of the Constitution gives me that responsibility and the authority necessary to fulfill it. And after September the 11th, the United States Congress also granted me additional authority to use military force against Al Qaida.

After September the 11th, one question my administration had to answer was how, using the authorities I have, how do we effectively detect enemies hiding in our midst and prevent them from striking us again? We know that a 2-minute phone conversation between somebody linked to Al Qaida here and an operative overseas could lead directly to the loss of thousands of lives. To

save American lives, we must be able to act fast and to detect these conversations so we can prevent new attacks.

So, consistent with U.S. law and the Constitution, I authorized the interception of international communications of people with known links to Al Qaida and related terrorist organizations. This program is carefully reviewed approximately every 45 days to ensure it is being used properly. Leaders in the United States Congress have been briefed more than a dozen times on this program. And it has been effective in disrupting the enemy while safeguarding our civil liberties.

This program has targeted those with known links to Al Qaida. I've reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for so long as our Nation is—for so long as the Nation faces the continuing threat of an enemy that wants to kill American citizens.

* * * * *

[[Page 1889]]

I said the other day that a mistake was trying to train a civilian defense force and an Iraqi Army at the same time but not giving the civilian defense force enough training and tools necessary to be able to battle a group of thugs and killers. And so we adjusted.

And the point I'm trying to make to the American people in this, as you said, candid dialog—I hope I've been candid all along, but in the candid dialog—is to say, we're constantly changing our tactics to meet the changing tactics of an enemy. And that's important for our citizens to understand.

Thank you. Kelly [Kelly Wallace, Cable News Network].

Open Dialog on Wiretaps

Q. Thank you, Mr. President. If you believe that present law needs to be faster, more agile, concerning the surveillance of conversations from someone in the United States to somewhere outside the country—

The President. Right.

Q. —why, in the 4 years since 9/11, has your administration not sought to get changes in the law instead of bypassing it, as some of your critics have said?

The President. No, I appreciate that. First, I want to make clear to the people listening that this program is limited in nature to those that are known Al Qaida ties and/or affiliates. That's important. So it's a program that's limited, and you brought up something that I want to stress, and that is, is that these calls are not intercepted within the country. They are from outside the country to in the country or vice versa. So in other words, this is not a—if you're calling from Houston to L.A., that call is not monitored. And if there was ever any need to monitor, there would be a process to do that.

I think I've got the authority to move forward, Kelly. I mean, this is what it's—and the Attorney General was out briefing this morning and I—about why it's legal to make the decisions I'm making. I can fully understand why Members of Congress are expressing concerns about civil liberties. I know that. And it's—I share the same concerns. I want to make sure the American people understand, however, that we have an obligation to protect you, and we're doing that and, at the same time, protecting your civil liberties.

Secondly, an open debate about law would say to the enemy, "Here's what we're going to do." And this is an enemy which adjusts. We monitor this program carefully. We have consulted with Members of the Congress over a dozen times. We are constantly reviewing the program. Those of us who review the program have a duty to uphold the laws of the United States, and we take that duty very seriously.

Let's see here—Martha [Martha Raddatz, ABC News]—working my way around the electronic media, here.

Domestic Wiretaps

Q. Thank you, Mr. President. You say you have an obligation to protect us. Then why not monitor those calls between Houston and L.A.? If the threat is so great, and you use the same logic, why not monitor those calls? Americans thought they weren't being spied on in calls overseas—why not within the country, if the threat is so great?

The President. We will, under current law, if we have to. We will monitor those calls. And that's why there is a FISA law. We will apply for the right to do so. And there's a difference—let me finish—there is a difference between detecting, so we can prevent, and monitoring. And it's important to know the distinction between the two.

Q. But preventing is one thing, and you said the FISA laws essentially don't work because of the speed in monitoring calls overseas.

The President. I said we use the FISA courts to monitor calls. It's a very important tool, and we do use it. I just want to make sure we've got all tools at our

disposal. This is an enemy which is quick, and it's lethal. And sometimes we have to move very, very quickly. But if there is a need based upon evidence, we will take that evidence to a court in order to be able to monitor calls within the United States.

Who haven't I called on, let's see here. Suzanne [Suzanne Malveaux, Cable News Network].

* * * * *

EXHIBIT D

[SEAL OMITTED] For Immediate Release
Office of the Press Secretary

December 19, 2005

Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence

James S. Brady Briefing Room

8:30 A.M. EST

MR. McCLELLAN: Good morning, everybody. I've got with me the Attorney General and General Hayden here this morning to brief you on the legal issues surrounding the NSA authorization and take whatever questions you have for them on that. The Attorney General will open with some comments and then they'll be glad to take your questions.

And with that, I'll turn it over to General Gonzales.

ATTORNEY GENERAL GONZALES: Thanks, Scott.

The President confirmed the existence of a highly classified program on Saturday. The program remains highly classified; there are many operational aspects of the program that have still not been disclosed and we want to protect that because those aspects of the program are very, very important to protect the national security of this country. So I'm only going to be talking about the legal underpinnings for what has been disclosed by the President.

The President has authorized a program to engage in electronic surveillance of a particular kind, and this would be the intercepts of contents of communications where one of the—one party to the communication is outside the United States. And this is a very important point—people are running around saying that the United States is somehow spying on American citizens calling their neighbors. Very, very important to understand that one party to the communication has to be outside the United States.

Another very important point to remember is that we have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda. We view these authorities as authorities to confront the enemy in which the United States is at war with—and that is al Qaeda and those who are supporting or affiliated with al Qaeda.

What we're trying to do is learn of communications, back and forth, from within the United States to overseas with members of al Qaeda. And that's what this program is about.

Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act provides—requires a court order before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday, unless there is somehow—there is—unless otherwise authorized by statute or by Congress. That's what the law requires. Our position is, is that the authorization to use force, which was passed by the Congress in the days following September 11th, constitutes that other autho-

rization, that other statute by Congress, to engage in this kind of signals intelligence.

Now, that—one might argue, now, wait a minute, there's nothing in the authorization to use force that specifically mentions electronic surveillance. Let me take you back to a case that the Supreme Court reviewed this past—in 2004, the Hamdi decision. As you remember, in that case, Mr. Hamdi was a U.S. citizen who was contesting his detention by the United States government. What he said was that there is a statute, he said, that specifically prohibits the detention of American citizens without permission, an act by Congress—and he's right, 18 USC 4001a requires that the United States government cannot detain an American citizen except by an act of Congress.

We took the position—the United States government took the position that Congress had authorized that detention in the authorization to use force, even though the authorization to use force never mentions the word "detention." And the Supreme Court, a plurality written by Justice O'Connor agreed. She said, it was clear and unmistakable that the Congress had authorized the detention of an American citizen captured on the battlefield as an enemy combatant for the remainder—the duration of the hostilities. So even though the authorization to use force did not mention the word, "detention," she felt that detention of enemy soldiers captured on the battlefield was a fundamental incident of waging war, and therefore, had been authorized by Congress when they used the words, "authorize the President to use all necessary and appropriate force."

For the same reason, we believe signals intelligence is even more a fundamental incident of war, and we believe has been authorized by the Congress. And even though signals intelligence is not mentioned in the authorization to use force, we believe that the Court would apply the same reasoning to recognize the authorization by Congress to engage in this kind of electronic surveillance.

I might also add that we also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity. Signals intelligence has been a fundamental aspect of waging war since the Civil War, where we intercepted telegraphs, obviously, during the world wars, as we intercepted telegrams in and out of the United States. Signals intelligence is very important for the United States government to know what the enemy is doing, to know what the enemy is about to do. It is a fundamental incident of war, as Justice O'Connor talked about in the Hamdi decision. We believe that—and those two authorities exist to allow, permit the United States government to engage in this kind of surveillance.

The President, of course, is very concerned about the protection of civil liberties, and that's why we've got strict parameters, strict guidelines in place out at NSA to ensure that the program is operating in a way that is consistent with the President's directives. And, again, the authorization by the President is only to engage in surveillance of communications where one party is outside the United States, and where we have a reasonable basis to conclude that one of the parties of the communication is either a member of al Qaeda or affiliated with al Qaeda.

Mike, do you want to—have anything to add?

GENERAL HAYDEN: I'd just add, in terms of what we do globally with regard to signals intelligence, which is a critical part of defending the nation, there are probably no communications more important to what it is we're trying to do to defend the nation; no communication is more important for that purpose than those communications that involve al Qaeda, and one end of which is inside the homeland, one end of which is inside the United States. Our purpose here is to detect and prevent attacks. And the program in this regard has been successful.

Q General, are you able to say how many Americans were caught in this surveillance?

ATTORNEY GENERAL GONZALES: I'm not—I can't get into the specific numbers because that information remains classified. Again, this is not a situation where—of domestic spying. To the extent that there is a moderate and heavy communication involving an American citizen, it would be a communication where the other end of the call is outside the United States and where we believe that either the American citizen or the person outside the United States is somehow affiliated with al Qaeda.

Q General, can you tell us why you don't choose to go to the FISA court?

ATTORNEY GENERAL GONZALES: Well, we continue to go to the FISA court and obtain orders. It is a very important tool that we continue to utilize. Our position is that we are not legally required to do, in this particular case, because the law requires that we—

FISA requires that we get a court order, unless authorized by a statute, and we believe that authorization has occurred.

The operators out at NSA tell me that we don't have the speed and the agility that we need, in all circumstances, to deal with this new kind of enemy. You have to remember that FISA was passed by the Congress in 1978. There have been tremendous advances in technology—

Q But it's been kind of retroactively, hasn't it?

ATTORNEY GENERAL GONZALES: —since then. Pardon me?

Q It's been done retroactively before, hasn't it?

ATTORNEY GENERAL GONZALES: What do you mean, "retroactively"?

Q You just go ahead and then you apply for the FISA clearance, because it's damn near automatic.

ATTORNEY GENERAL GONZALES: If we—but there are standards that have to be met, obviously, and you're right, there is a procedure where we—an emergency procedure that allows us to make a decision to authorize—to utilize FISA, and then we go to the court and get confirmation of that authority.

But, again, FISA is very important in the war on terror, but it doesn't provide the speed and the agility that we need in all circumstances to deal with this new kind of threat.

Q But what—go ahead.

GENERAL HAYDEN: Let me just add to the response to the last question. As the Attorney General says,

FISA is very important, we make full use of FISA. But if you picture what FISA was designed to do, FISA is designed to handle the needs in the nation in two broad categories: there's a law enforcement aspect of it; and the other aspect is the continued collection of foreign intelligence. I don't think anyone could claim that FISA was envisaged as a tool to cover armed enemy combatants in preparation for attacks inside the United States. And that's what this authorization under the President is designed to help us do.

Q Have you identified armed enemy combatants, through this program, in the United States?

GENERAL HAYDEN: This program has been successful in detecting and preventing attacks inside the United States.

Q General Hayden, I know you're not going to talk about specifics about that, and you say it's been successful. But would it have been as successful—can you unequivocally say that something has been stopped or there was an imminent attack or you got information through this that you could not have gotten through going to the court?

GENERAL HAYDEN: I can say unequivocally, all right, that we have got information through this program that would not otherwise have been available.

Q Through the court? Because of the speed that you got it?

GENERAL HAYDEN: Yes, because of the speed, because of the procedures, because of the processes and requirements set up in the FISA process, I can say un-

equivocally that we have used this program in lieu of that and this program has been successful.

Q But one of the things that concerns people is the slippery slope. If you said you absolutely need this program, you have to do it quickly—then if you have someone you suspect being a member of al Qaeda, and they're in the United States, and there is a phone call between two people in the United States, why not use that, then, if it's so important? Why not go that route? Why not go further?

GENERAL HAYDEN: Across the board, there is a judgment that we all have to make—and I made this speech a day or two after 9/11 to the NSA workforce—I said, free peoples always have to judge where they want to be on that spectrum between security and liberty; that there will be great pressures on us after those attacks to move our national banner down in the direction of security. What I said to the NSA workforce is, our job is to keep Americans free by making Americans feel safe again. That's been the mission of the National Security Agency since the day after the attack, is when I talked—two days after the attack is when I said that to the workforce.

There's always a balancing between security and liberty. We understand that this is a more—I'll use the word "aggressive" program than would be traditionally available under FISA. It is also less intrusive. It deals only with international calls. It is generally for far shorter periods of time. And it is not designed to collect reams of intelligence, but to detect and warn and prevent about attacks. And, therefore, that's where we've decided to draw that balance between security and liberty.

Q Gentlemen, can you say when Congress was first briefed, who was included in that, and will there be a leaks investigation?

ATTORNEY GENERAL GONZALES: Well of course, we're not going to—we don't talk about—we try not to talk about investigations. As to whether or not there will be a leak investigation, as the President indicated, this is really hurting national security, this has really hurt our country, and we are concerned that a very valuable tool has been compromised. As to whether or not there will be a leak investigation, we'll just have to wait and see.

And your first question was?

Q When was Congress first briefed—

ATTORNEY GENERAL GONZALES: I'm not going to—I'm not going to talk about—I'll let others talk about when Congress was first briefed. What I can say is, as the President indicated on Saturday, there have been numerous briefings with certain key members of Congress. Obviously, some members have come out since the revelations on Saturday, saying that they hadn't been briefed. This is a very classified program. It is probably the most classified program that exists in the United States government, because the tools are so valuable, and therefore, decisions were made to brief only key members of Congress. We have begun the process now of reaching out to other members of Congress. I met last night, for example, with Chairman Specter and other members of Congress to talk about the legal aspects of this program.

And so we are engaged in a dialogue now to talk with Congress, but also—but we're still mindful of the fact that still—this is still a very highly classified program, and there are still limits about what we can say today, even to certain members of Congress.

Q General, what's really compromised by the public knowledge of this program? Don't you assume that the other side thinks we're listening to them? I mean, come on.

GENERAL HAYDEN: The fact that this program has been successful is proof to me that what you claim to be an assumption is certainly not universal. The more we discuss it, the more we put it in the face of those who would do us harm, the more they will respond to this and protect their communications and make it more difficult for us to defend the nation.

Q Mr. Attorney General—

Q —became public, have you seen any evidence in a change in the tactics or—

ATTORNEY GENERAL GONZALES: We're not going to comment on that kind of operational aspect.

Q You say this has really hurt the American people. Is that based only on your feeling about it, or is there some empirical evidence to back that up, even if you can't—

ATTORNEY GENERAL GONZALES: I think the existence of this program, the confirmation of the—I mean, the fact that this program exists, in my judgment, has compromised national security, as the President indicated on Saturday.

Q I'd like to ask you, what are the constitutional limits on this power that you see laid out in the statute and in your inherent constitutional war power? And what's to prevent you from just listening to everyone's conversation and trying to find the word "bomb," or something like that?

ATTORNEY GENERAL GONZALES: Well, that's a good question. This was a question that was raised in some of my discussions last night with members of Congress. The President has not authorized—has not authorized blanket surveillance of communications here in the United States. He's been very clear about the kind of surveillance that we're going to engage in. And that surveillance is tied with our conflict with al Qaeda.

You know, we feel comfortable that this surveillance is consistent with requirements of the 4th Amendment. The touchstone of the 4th Amendment is reasonableness, and the Supreme Court has long held that there are exceptions to the warrant requirement in—when special needs outside the law enforcement arena. And we think that that standard has been met here. When you're talking about communications involving al Qaeda, when you—obviously there are significant privacy interests implicated here, but we think that those privacy interests have been addressed; when you think about the fact that this is an authorization that's ongoing, it's not a permanent authorization, it has to be reevaluated from time to time. There are additional safeguards that have been in place—that have been imposed out at NSA, and we believe that it is a reasonable application of these authorities.

Q Mr. Attorney General, haven't you stretched—

Q —adequate because of technological advances? Wouldn't you do the country a better service to address that issue and fix it, instead of doing a backdoor approach—

ATTORNEY GENERAL GONZALES: This is not a backdoor approach. We believe Congress has authorized this kind of surveillance. We have had discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.

Q If this is not backdoor, is this at least a judgment call? Can you see why other people would look at it and say, well, no, we don't see it that way?

ATTORNEY GENERAL GONZALES: I think some of the concern is because people had not been briefed; they don't understand the specifics of the program, they don't understand the strict safeguards within the program. And I haven't had a discussion—an opportunity to have a discussion with them about our legal analysis. So, obviously, we're in that process now. Part of the reason for this press brief today is to have you help us educate the American people and the American Congress about what we're doing and the legal basis for what we're doing.

Q Al, you talk about the successes and the critical intercepts of the program. Have there also been cases in which after listening in or intercepting, you realize you had the wrong guy and you listened to what you shouldn't have?

GENERAL HAYDEN: That's why I mentioned earlier that the program is less intrusive. It deals only with international calls. The time period in which we would conduct our work is much shorter, in general, overall, than it would be under FISA. And one of the true purposes of this is to be very agile, as you described.

If this particular line of logic, this reasoning that took us to this place proves to be inaccurate, we move off of it right away.

Q Are there cases in which—

GENERAL HAYDEN: Yes, of course.

Q Can you give us some idea of percentage, or how often you get it right and how often you get it wrong?

GENERAL HAYDEN: No, it would be very—no, I cannot, without getting into the operational details. I'm sorry.

Q But there are cases where you wind up listening in where you realize you shouldn't have?

GENERAL HAYDEN: There are cases like we do with regard to the global SIGIN system—you have reasons to go after particular activities, particular communications. There's a logic; there is a standard as to why you would go after that, not just in a legal sense, which is very powerful, but in a practical sense. We can't waste resources on targets that simply don't provide valuable information. And when we decide that is the case—and in this program, the standards, in terms of re-evaluating whether or not this coverage is worthwhile at all, are measured in days and weeks.

Q Would someone in a case in which you got it wrong have a cause of action against the government?

ATTORNEY GENERAL GONZALES: That is something I'm not going to answer, Ken.

Q I wanted to ask you a question. Do you think the government has the right to break the law?

ATTORNEY GENERAL GONZALES: Absolutely not. I don't believe anyone is above the law.

Q You have stretched this resolution for war into giving you carte blanche to do anything you want to do.

ATTORNEY GENERAL GONZALES: Well, one might make that same argument in connection with detention of American citizens, which is far more intrusive than listening into a conversation. There may be some members of Congress who might say, we never—

Q That's your interpretation. That isn't Congress' interpretation.

ATTORNEY GENERAL GONZALES: Well, I'm just giving you the analysis—

Q You're never supposed to spy on Americans.

ATTORNEY GENERAL GONZALES: I'm just giving the analysis used by Justice O'Connor—and she said clearly and unmistakenly the Congress authorized the President of the United States to detain an American citizen, even though the authorization to use force never mentions the word "detention"—

Q —into wiretapping everybody and listening in on—

ATTORNEY GENERAL GONZALES: This is not about wiretapping everyone. This is a very concentrated, very limited program focused at gaining information about our enemy.

Q Now that the cat is out of the bag, so to speak, do you expect your legal analysis to be tested in the courts?

ATTORNEY GENERAL GONZALES: I'm not going to, you know, try to guess as to what's going to happen about that. We're going to continue to try to educate the American people and the American Congress about what we're doing and the basis—why we believe that the President has the authority to engage in this kind of conduct.

Q Because there are some very smart legal minds who clearly think a law has been broken here.

ATTORNEY GENERAL GONZALES: Well, I think that they may be making or offering up those opinions or assumptions based on very limited information. They don't have all the information about the program. I think they probably don't have the information about our legal analysis.

Q Judge Gonzales, will you release then, for the reasons you're saying now, the declassified versions of the legal rationale for this from OLC? And if not, why not? To assure the American public that this was done with the legal authority that you state.

ATTORNEY GENERAL GONZALES: We're engaged now in a process of educating the American people, again, and educating the Congress. We'll make the appropriate evaluation at the appropriate time as to

whether or not additional information needs to be provided to the Congress or the American people.

Q You declassified OLC opinions before, after the torture—why not do that here to show, yes, we went through a process?

ATTORNEY GENERAL GONZALES: I'm not confirming the existence of opinions or the non-existence of opinions. I've offered up today our legal analysis of the authorities of this President.

Q Sir, can you explain, please, the specific inadequacies in FISA that have prevented you from sort of going through the normal channels?

GENERAL HAYDEN: One, the whole key here is agility. And let me re-trace some grounds I tried to suggest earlier. FISA was built for persistence. FISA was built for long-term coverage against known agents of an enemy power. And the purpose involved in each of those—in those cases was either for a long-term law enforcement purpose or a long-term intelligence purpose.

This program isn't for that. This is to detect and prevent. And here the key is not so much persistence as it is agility. It's a quicker trigger. It's a subtly softer trigger. And the intrusion into privacy—the intrusion into privacy is significantly less. It's only international calls. The period of time in which we do this is, in most cases, far less than that which would be gained by getting a court order. And our purpose here, our sole purpose is to detect and prevent.

Again, I make the point, what we are talking about here are communications we have every reason to believe are al Qaeda communications, one end of which is in the

United States. And I don't think any of us would want any inefficiencies in our coverage of those kinds of communications, above all. And that's what this program allows us to do—it allows us to be as agile as operationally required to cover these targets.

Q But how does FISA—

GENERAL HAYDEN: FISA involves the process—FISA involves marshaling arguments; FISA involves looping paperwork around, even in the case of emergency authorizations from the Attorney General. And beyond that, it's a little—it's difficult for me to get into further discussions as to why this is more optimized under this process without, frankly, revealing too much about what it is we do and why and how we do it.

Q If FISA didn't work, why didn't you seek a new statute that allowed something like this legally?

ATTORNEY GENERAL GONZALES: That question was asked earlier. We've had discussions with members of Congress, certain members of Congress, about whether or not we could get an amendment to FISA, and we were advised that that was not likely to be—that was not something we could likely get, certainly not without jeopardizing the existence of the program, and therefore, killing the program. And that—and so a decision was made that because we felt that the authorities were there, that we should continue moving forward with this program.

Q And who determined that these targets were al Qaeda? Did you wiretap them?

GENERAL HAYDEN: The judgment is made by the operational work force at the National Security Agency

using the information available to them at the time, and the standard that they apply—and it's a two-person standard that must be signed off by a shift supervisor, and carefully recorded as to what created the operational imperative to cover any target, but particularly with regard to those inside the United States.

Q So a shift supervisor is now making decisions that a FISA judge would normally make? I just want to make sure I understand. Is that what you're saying?

GENERAL HAYDEN: What we're trying to do is to use the approach we have used globally against al Qaeda, the operational necessity to cover targets. And the reason I emphasize that this is done at the operational level is to remove any question in your mind that this is in any way politically influenced. This is done to chase those who would do harm to the United States.

Q Building on that, during—

Q Thank you, General. Roughly when did those conversations occur with members of Congress?

ATTORNEY GENERAL GONZALEZ: I'm not going to get into the specifics of when those conversations occurred, but they have occurred.

Q May I just ask you if they were recently or if they were when you began making these exceptions?

ATTORNEY GENERAL GONZALEZ: They weren't recently.

MR. McCLELLAN: The President indicated that those—the weeks after September 11th.

Q What was the date, though, of the first executive order? Can you give us that?

GENERAL HAYDEN: If I could just, before you ask that question, just add—these actions that I described taking place at the operational level—and I believe that a very important point to be made—have intense oversight by the NSA Inspector General, by the NSA General Counsel, and by officials of the Justice Department who routinely look into this process and verify that the standards set out by the President are being followed.

Q Can you absolutely assure us that all of the communications intercepted—

Q Have you said that you—(inaudible)—anything about this program with your international partners—with the partners probably in the territories of which you intercept those communications?

ATTORNEY GENERAL GONZALEZ: I'm not aware of discussions with other countries, but that doesn't mean that they haven't occurred. I simply have no personal knowledge of that.

Q Also, is it only al Qaeda, or maybe some other terrorist groups?

ATTORNEY GENERAL GONZALEZ: Again, with respect to what the President discussed on Saturday, this program—it is tied to communications where we believe one of the parties is affiliated with al Qaeda or part of an organization or group that is supportive of al Qaeda.

Q Sir, during his confirmation hearings, it came out that now-Ambassador Bolton had sought and obtained

NSA intercepts of conversations between American citizens and others. Who gets the information from this program; how do you guarantee that it doesn't get too widely spread inside the government, and used for other purposes?

Q And is it destroyed afterwards?

GENERAL HAYDEN: We report this information the way we report any other information collected by the National Security Agency. And the phrase you're talking about is called minimization of U.S. identities. The same minimalizationist standards apply across the board, including for this program. To make this very clear—U.S. identities are minimized in all of NSA's activities, unless, of course, the U.S. identity is essential to understand the inherent intelligence value of the intelligence report. And that's the standard that's used.

Q General, when you discussed the emergency powers, you said, agility is critical here. And in the case of the emergency powers, as I understand it, you can go in, do whatever you need to do, and within 72 hours just report it after the fact. And as you say, these may not even last very long at all. What would be the difficulty in setting up a paperwork system in which the logs that you say you have the shift supervisors record are simply sent to a judge after the fact? If the judge says that this is not legitimate, by that time probably your intercept is over, wouldn't that be correct?

GENERAL HAYDEN: What you're talking about now are efficiencies. What you're asking me is, can we do this program as efficiently using the one avenue provided to us by the FISA Act, as opposed to the avenue

provided to us by subsequent legislation and the President's authorization.

Our operational judgment, given the threat to the nation that the difference in the operational efficiencies between those two sets of authorities are such that we can provide greater protection for the nation operating under this authorization.

Q But while you're getting an additional efficiency, you're also operating outside of an existing law. If the law would allow you to stay within the law and be slightly less efficient, would that be—

ATTORNEY GENERAL GONZALEZ: I guess I disagree with that characterization. I think that this electronic surveillance is within the law, has been authorized. I mean, that is our position. We're only required to achieve a court order through FISA if we don't have authorization otherwise by the Congress, and we think that that has occurred in this particular case.

Q Can you just give us one assurance before you go, General?

ATTORNEY GENERAL GONZALEZ: It depends on what it is. (Laughter.)

Q Can you assure us that all of these intercepts had an international component and that at no time were any of the intercepts purely domestic?

GENERAL HAYDEN: The authorization given to NSA by the President requires that one end of these communications has to be outside the United States. I can assure you, by the physics of the intercept, by how we actually conduct our activities, that one end of these com-

munications are always outside the United States of America.

END 9:02 A.M. EST

EXHIBIT E

REMARKS BY GENERAL MICHAEL V. HAYDEN

Principal Deputy Director of National Intelligence
and
Former Director of the National Security Agency

Address to the National Press Club

WHAT AMERICAN INTELLIGENCE &
ESPECIALLY THE NSA HAVE BEEN DOING
TO DEFEND THE NATION

National Press Club
Washington, D.C.

10:00 A.M. EST
MONDAY, JANUARY 23, 2006

MR. HILL: Good morning. My name is Keith Hill. I'm an editor/writer with the Bureau of National Affairs, Press Club governor and vice chair of the club's Newsmaker Committee, and I'll be today's moderator.

Today, we have General Michael Hayden, principal deputy director of National Intelligence with the Office of National Intelligence, who will talk about the recent controversy surrounding the National Security Agency's warrantless monitoring of communications of suspected al Qaeda terrorists.

General Hayden, who's been in this position since last April, is currently the highest ranking military intelligence officer in the armed services, and he also knows a little something about this controversy because in his previous life he was NSA director when the NSA monitoring program began in 2000–2001, sorry.

So with that, I will turn the podium over to General Hayden.

GEN. HAYDEN: Keith, thanks. Good morning. I'm happy to be here to talk a bit about what American intelligence has been doing and especially what NSA has been doing to defend the nation.

Now, as Keith points out, I'm here today not only as Ambassador John Negroponte's deputy in the Office of the Director of National Intelligence, I'm also here as the former director of the National Security Agency, a post I took in March of 1999 and left only last spring.

Serious issues have been raised in recent weeks, and discussion of serious issues should be based on facts. There's a lot of information out there right now.

Some of it is, frankly, inaccurate. Much of it is just simply misunderstood. I'm here to tell the American people what NSA has been doing and why. And perhaps more importantly, what NSA has not been doing.

Now, admittedly, this is a little hard to do while protecting our country's intelligence sources and methods. And, frankly, people in my line of work generally don't like to talk about what they've done until it becomes a subject on the History Channel. But let me make one thing very clear. As challenging as this morning might be, this is the speech I want to give. I much prefer being here with you today telling you about the things we have done when there hasn't been an attack on the homeland. This is a far easier presentation to make than the ones I had to give four years ago telling audiences like you what we hadn't done in the days and months leading up to the tragic events of September 11th.

* * * * *

* * * commonly refer to it as Signals Intelligence or SIGINT. SIGINT is a complex business, with operational and technological and legal imperatives often intersecting and overlapping. There's routinely some freedom of action—within the law—to adjust operations. After the attacks, I exercised some options I've always had that collectively better prepared us to defend the homeland.

Look, let me talk for a minute about this, okay? Because a big gap in the current understanding, a big gap in the current debate is what's standard? What is it that NSA does routinely? Where we set the threshold, for example, for what constitutes inherent foreign intelligence value? That's what we're directed to collect. That's what we're required to limit ourselves to—inherent foreign intelligence value. Where we set that threshold, for example, in reports involving a U.S. person shapes how we do our job, shapes how we collect, shapes how we report. The American SIGINT system, in the normal course of foreign intelligence activities, inevitably captures this kind of information, information to, from or about what we call a U.S. person. And by the way, "U.S. person" routinely includes anyone in the United States, citizen or not.

So, for example, because they were in the United States —and we did not know anything more—Mohamed Atta and his fellow 18 hijackers would have been presumed to have been protected persons, U.S. persons, by NSA prior to 9/11.

Inherent foreign intelligence value is one of the metrics we must use. Let me repeat that: Inherent foreign in-

telligence value is one of the metrics we must use to ensure that we conform to the Fourth Amendment's reasonable standard when it comes to protecting the privacy of these kinds of people. If the U.S. person information isn't relevant, the data is suppressed. It's a technical term we use; we call it "minimized." The individual is not even mentioned. Or if he or she is, he or she is referred to as "U.S. Person Number One" or "U.S. Person Number Two." Now, inherent intelligence value. If the U.S. person is actually the named terrorist, well, that could be a different matter. The standard by which we decided that, the standard of what was relevant and valuable, and therefore, what was reasonable, would understandably change, I think, as smoke billowed from two American cities and a Pennsylvania farm field. And we acted accordingly.

To somewhat oversimplify this, this question of inherent intelligence value, just by way of illustration, to just use an example, we all had a different view of Zacarias Moussaoui's computer hard drive after the attacks than we did before.

Look, this is not unlike things that happened in other areas. Prior to September 11th, airline passengers were screened in one way. After September 11th, we changed how we screen passengers. In the same way, okay, although prior to September 11th certain communications weren't considered valuable intelligence, it became immediately clear after September 11th that intercepting and reporting these same communications were in fact critical to defending the homeland. Now let me make this point. These decisions were easily within my authorities as the director of NSA under and executive order; known as Executive Order 12333, that was signed

in 1981, an executive order that has governed NSA for nearly a quarter century.

Now, let me summarize. In the days after 9/11, NSA was using its authorities and its judgment to appropriately respond to the most catastrophic attack on the homeland in the history of the nation. That shouldn't be a headline, but as near as I can tell, these actions on my part have created some of the noise in recent press coverage. Let me be clear on this point—except that they involved NSA, these programs were not related—these programs were not related—to the authorization that the president has recently spoken about. Back then, September 2001, I asked to update the Congress on what NSA had been doing, and I briefed the entire House Intelligence Committee on the 1st of October on what we had done under our previously existing authorities.

Now, as another part of our adjustment, we also turned on the spigot of NSA reporting to FBI in, frankly, an unprecedented way. We found that we were giving them too much data in too raw form. We recognized it almost immediately, a question of weeks, and we made all of the appropriate adjustments. Now, this flow of data to the FBI has also become part of the current background noise, and despite reports in the press of thousands of tips a month, our reporting has not even approached that kind of pace. You know, I actually find this a little odd. After all the findings of the 9/11 commission and other bodies about the failure to share intelligence, I'm up here feeling like I have to explain pushing data to those who might be able to use it. And of course, it's the nature of intelligence that many tips lead nowhere, but

you have to go down some blind alleys to find the tips that pay off.

Now, beyond the authorities that I exercised under the standing executive order, as the war on terror has moved forward, we have aggressively used FISA warrants. The act and the court have provided us with important tools, and we make full use of them. Published numbers show us using the court at record rates, and the results have been outstanding. But the revolution in telecommunications technology has extended the actual impact of the FISA regime far beyond what Congress could ever have anticipated in 1978. And I don't think that anyone can make the claim that the FISA statute is optimized to deal with or prevent a 9/11 or to deal with a lethal enemy who likely already had combatants inside the United States.

I testified in open session to the House Intel Committee in April of the year 2000. At the time, I created some looks of disbelief when I said that if Osama bin Laden crossed the bridge from Niagara Falls, Ontario to Niagara Falls, New York, there were provisions of U.S. law that would kick in, offer him protections and affect how NSA could now cover him. At the time, I was just using this as some of sort of stark hypothetical; 17 months later, this is about life and death.

So now, we come to one additional piece of NSA authorities. These are the activities whose existence the president confirmed several weeks ago. That authorization was based on an intelligence community assessment of a serious and continuing threat to the homeland. The lawfulness of the actual authorization was reviewed by

lawyers at the Department of Justice and the White House and was approved by the attorney general.

Now, you're looking at me up here, and I'm in a military uniform, and frankly, there's a certain sense of sufficiency here—authorized by the president, duly ordered, its lawfulness attested to by the attorney general and its content briefed to the congressional leadership.

But we all have personal responsibility, and in the end, NSA would have to implement this, and every operational decision the agency makes is made with the full involvement of its legal office. NSA professional career lawyers—and the agency has a bunch of them—have a well-deserved reputation. They're good, they know the law, and they don't let the agency take many close pitches.

And so even though I knew the program had been reviewed by the White House and by DOJ, by the Department of Justice, I asked the three most senior and experienced lawyers in NSA: Our enemy in the global war on terrorism doesn't divide the United States from the rest of the world, the global telecommunications system doesn't make that distinction either, our laws do and should; how did these activities square with these facts?

They reported back to me. They supported the lawfulness of this program. Supported, not acquiesced. This was very important to me. A veteran NSA lawyer, one of the three I asked, told me that a correspondent had suggested to him recently that all of the lawyers connected with this program have been very careful from the outset because they knew there would be a day of reckoning. The NSA lawyer replied to him that that had not been the case. NSA had been so careful, he said—

and I'm using his words now here—NSA had been so careful because in this very focused, limited program, NSA had to ensure that it dealt with privacy interests in an appropriate manner.

In other words, our lawyers weren't careful out of fear; they were careful out of a heartfelt, principled view that NSA operations had to e [*sic*] consistent with bedrock legal protections.

In early October 2001, I gathered key members of the NSA workforce in our conference room and I introduced our new operational authority to them. With the historic culture of NSA being what it was and is, I had to do this personally. I told them what we were going to do and why. I also told them that we were going to carry out this program and not go one step further. NSA's legal and operational leadership then went into the details of this new task.

You know, the 9/11 commission criticized our ability to link things happening in the United States with things that were happening elsewhere. In that light, there are no communications more important to the safety of this country than those affiliated with al Qaeda with one end in the United States. The president's authorization allows us to track this kind of call more comprehensively and more efficiently. The trigger is quicker and a bit softer than it is for a FISA warrant, but the intrusion into privacy is also limited: only international calls and only those we have a reasonable basis to believe involve al Qaeda or one of its affiliates.

The purpose of all this is not to collect reams of intelligence, but to detect and prevent attacks. The intelligence community has neither the time, the resources

nor the legal authority to read communications that aren't likely to protect us, and NSA has no interest in doing so. These are communications that we have reason to believe are al Qaeda communications, a judgment made by American intelligence professionals, not folks like me or political appointees, a judgment made by the American intelligence professionals most trained to understand al Qaeda tactics, al Qaeda communications and al Qaeda aims.

Their work is actively overseen by the most intense oversight regime in the history of the National Security Agency. The agency's conduct of this program is thoroughly reviewed by the NSA's general counsel and inspector general. The program has also been reviewed by the Department of Justice for compliance with the president's authorization. Oversight also includes an aggressive training program to ensure that all activities are consistent with the letter and the intent of the authorization and with the preservation of civil liberties.

Let me talk for a few minutes also about what this program is not. It is not a driftnet over Dearborn or Lackawanna or Freemont grabbing conversations that we then sort out by these alleged keyword searches or data-mining tools or other devices that so-called experts keep talking about.

This is targeted and focused. This is not about intercepting conversations between people in the United States. This is hot pursuit of communications entering or leaving America involving someone we believe is associated with al Qaeda. We bring to bear all the technology we can to ensure that this is so. And if there were ever an anomaly, and we * * * *

* * * * *

Thank you. I'll be happy to take your questions.

MR. HILL: We have microphones on either end of the room, so if you can go to a microphone, and then choose people from there.

All right, we will start with you.

QUESTION: Yes, Wayne Madsen, syndicated columnist. General, how do you explain the fact that there were several rare spectacles of whistleblowers coming forward at NSA, especially after 9/11, something that hasn't really happened in the past, who have complained about violations of FISA and United States Signals Intelligence Directive 18, which implements the law at the agency?

GEN. HAYDEN: I talked to the NSA staff on Friday. The NSA inspector general reports to me, as of last Friday, from the inception of this program through last Friday night, not a single employee of the National Security Agency has addressed a concern about this program to the NSA IG. I should also add that no member of the NSA workforce who has been asked to be included in this program has responded to that request with anything except enthusiasm. I don't know what you're talking about.

QUESTION: General Hayden, the FISA law says that the NSA can do intercepts as long as you go to the court within 72 hours to get a warrant.

I understood you to say that you are aggressively using FISA but selectively doing so. Why are you not able to go to FISA as the law requires in all cases? And if the

law is outdated, why haven't you asked Congress to update it?

GEN. HAYDEN: Lots of questions contained there. Let me try them one at a time.

First of all, I need to get a statement of fact out here, all right? NSA cannot—under the FISA statute, NSA cannot put someone on coverage and go ahead and play for 72 hours while it gets a note saying it was okay. All right? The attorney general is the one who approves emergency FISA coverage, and the attorney general's standard for approving FISA coverage is a body of evidence equal to that which he would present to the court. So it's not like you can throw it on for 72 hours.

I've talked in other circumstances—I've talked this morning—about how we've made very aggressive use of FISA. If you look at NSA reporting under this program—you know, without giving you the X or Y axis on the graph—NSA reporting under this program has been substantial but consistent. This is NSA counterterrorism reporting. Substantial but consistent. NSA reporting under FISA has gone like that. FISA has been a remarkably successful tool. We use it very aggressively.

In the instances where this program applies, FISA does not give us the operational effect that the authorities that the president has given us give us. Look. I can't—and I understand it's going to be an incomplete answer, and I can't give you all the fine print as to why, but let me just kind of reverse the answer just a bit. If FISA worked just as well, why wouldn't I use FISA? To save typing? No. There is an operational impact here, and I have two paths in front of me, both of them lawful, one

FISA, one the presidential—the president's authorization. And we go down this path because our operational judgment is it is much more effective. So we do it for that reason. I think I've got—I think I've covered all the ones you raised.

QUESTION: Quick follow-up. Are you saying that the sheer volume of warrantless eavesdropping has made FISA inoperative?

GEN. HAYDEN: No. I'm saying that the characteristics we need to do what this program's designed to do—to detect and prevent—make FISA a less useful tool. It's a wonderful tool, it's done wonderful things for the nation in terms of fighting the war on terror, but in this particular challenge, this particular aspect—detect and prevent attacks—what we're doing now is operationally more relevant, operationally more effective.

QUESTION: Sam Husseini from IPA Media. You just now spoke of, quote, "two paths," but of course the FISA statute itself says that it will be the exclusive means by which electronic surveillance may be pursued. Are you not, therefore, violating the law?

GEN. HAYDEN: That's probably a question I should deflect to the Department of Justice, but as I said in my comments, I have an order whose lawfulness has been attested to by the attorney general, an order whose lawfulness has been attested to by NSA lawyers who do this for a living. No, we're not violating the law.

QUESTION: You cited before the congressional powers of the president.

Are you—are you asserting inherent so-called constitutional powers that a—to use the term that came up in

the Alito hearings—"a unitary executive" has to violate the law when he deems fit?

GEN. HAYDEN: I'm not asserting anything. I'm asserting that NSA is doing its job.

QUESTION: General, first, thank you for your comments. And I think you somewhat answered this in your response, and this goes to the culture and just to the average American. Let me just say this—that domestic spying and the faith communities are outraged. Churches in Iowa, churches in Nebraska, mosques across the board are just outraged by the fact that our country could be spying on us. You made a point that the young lady at State Penn shouldn't have to worry, but we're worried that our country has begun to spy on us. We understand the need for terrorism and the need to deal with that, but what assurances—and how can you answer this question, what can make Americans feel safe? How can the faith community feel safe that their country is not spying on them for any reason?

GEN. HAYDEN: Reverend, thanks for the question, and I'm part of the faith community too. And I've laid it out as well I could in my remarks here as to how limited and focused this program is, what its purpose is, that its been productive. We are not out there—and again, let me use a phrase I used in the comments—this isn't a drift net out there where we're soaking up everyone's communications. We are going after very specific communications that our professional judgment tells us we have reason to believe are those associated with people who want to kill Americans. That's what we're doing.

And I realize the challenge the we have. I mentioned earlier the existential issue that NSA has well before

this program, that it's got to be powerful if it's going to protect us, and it's also got to be secretive if it's going to protect us. And that creates a tremendous dilemma. I understand that.

I'm disappointed I guess that perhaps the default response for some is to assume the worst. I'm trying to communicate to you that the people who are doing this, okay, go shopping in Glen Burnie and their kids play soccer in Laurel, and they know the law. They know American privacy better than the average American, and they're dedicated to it. So I guess the message I'd ask you to take back to your communities is the same one I take back to mine. This is focused. It's targeted. It's very carefully done. You shouldn't worry.

QUESTION: Just know, General, that the faith communities will take that back, but the faith communities are scared. Where does this stop?

QUESTION: Justine Redman with CNN. How was national security harmed by The New York Times reporting on this program? Don't the bad guys already assume that they're being monitored anyway, and shouldn't Americans, you know, bear in mind that they might be at any time?

GEN. HAYDEN: You know, we've had this question asked several times. Public discussion of how we determine al Qaeda intentions, I just—I can't see how that can do anything but harm the security of the nation. And I know people say, "Oh, they know they're being monitored." Well, you know, they don't always act like they know they're being monitored. But if you want to shove it in their face constantly, it's bound to have an impact.

And so to—I understand, as the Reverend's? [*sic*] question just raised, you know, there are issues here that the American people are deeply concerned with. But constant revelations and speculation and connecting the dots in ways that I find unimaginable, and laying that out there for our enemy to see cannot help but diminish our ability to detect and prevent attacks.

QUESTION: My name is Travis Morales. And we've read numerous reports in the Times and other papers about massive spying by the NSA on millions of people, along with reports of rendition, torture, et cetera. And I attended Congressman Conyers' hearings on Friday where a gentleman came from South Florida talking about military intelligence went and infiltrated his Quaker peace group, and that this—they later saw the documents detailing that.

And my question—I guess I have two questions for you. One is, as a participant in a group called, "The World Can't Wait: Drive Out the Bush Regime," which is organizing for people to drown out Bush's lies during the State of the Union, and to gather on February 4th demanding that Bush step down, my question is this: Are you or the NSA—and when I say you, I mean the NSA in its entirety—is it intercepting our e-mail communications, listening to our telephone conversations, et cetera? Because as Bush has said, you're either against us or you're with us, and they have asserted that whatever the president wants to do in time of war, whether it's holding people without charges or writing memos justifying torture, they can do that.

* * * * *

MR. HILL: Okay, I have to cut you off here.

We have time for two more questions. And if you can keep them fairly brief, we'd appreciate it.

First you, then the gentleman in the red.

QUESTION: Yeah, but—

MR. HILL: I'm sorry.

QUESTION: The first question that I asked—

MR. HILL: Excuse me. I'm sorry—

QUESTION: —about U.S. citizen abroad.

MR. HILL: All right. Go ahead.

GEN. HAYDEN: I'm sorry, I didn't—I apologize, I didn't understand the question, the first question. I'm sorry.

QUESTION: Jim Bamford. Good seeing you here in the Press Club, General,

GEN. HAYDEN: Hey, Jim.

QUESTION: Hope we see more of you here.

Just to clarify sort of what's been said, from what I've heard you say today and an earlier press conference, the change from going around the FISA law was to—one of them was to lower the standard from what they call for, which is basically probable cause to a reasonable basis; and then to take it away from a federal court judge, the FISA court judge, and hand it over to a shift supervisor at NSA. Is that what we're talking about here—just for clarification?

GEN. HAYDEN: You got most of it right. The people who make the judgment, and the one you just referred

to, there are only a handful of people at NSA who can make that decision. They're all senior executives, they are all counterterrorism and al Qaeda experts. So I—even though I—you're actually quoting me back, Jim, saying, "shift supervisor." To be more precise in what you just described, the person who makes that decision, a very small handful, senior executive. So in military terms, a senior colonel or general officer equivalent; and in professional terms, the people who know more about this than anyone else.

QUESTION: Well, no, that wasn't the real question. The question I was asking, though, was since you lowered the standard, doesn't that decrease the protections of the U.S. citizens? And number two, if you could give us some idea of the genesis of this. Did you come up with the idea? Did somebody in the White House come up with the idea? Where did the idea originate from?

Thank you.

GEN. HAYDEN: Let me just take the first one, Jim. And I'm not going to talk about the process by which the president arrived at his decision.

I think you've accurately described the criteria under which this operates, and I think I at least tried to accurately describe a changed circumstance, threat to the nation, and why this approach—limited, focused—has been effective.

MR. HILL: Final question.

QUESTION: Jonathan Landay with Knight Ridder. I'd like to stay on the same issue, and that had to do with the standard by which you use to target your wiretaps. I'm no lawyer, but my understanding is that the Fourth

Amendment of the Constitution specifies that you must have probable cause to be able to do a search that does not violate an American's right against unlawful searches and seizures. Do you use—

GEN. HAYDEN: No, actually—the Fourth Amendment actually protects all of us against unreasonable search and * * *

* * * * *

EXHIBIT F

[SEAL OMITTED]

The Attorney General
Washington, D.C.

January 17, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C 20510

The Honorable Arlen Specter
Ranking Minority Member
Committee of the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

I am writing to inform you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

In the spring of 2005—well before the first press account disclosing the existence of the Terrorist Surveillance Program—the Administration began exploring

options for seeking such FISA Court approval. Any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the Terrorist Surveillance Program. These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders.

The President is committed to using all lawful tools to protect our Nation from the terrorist threat, including making maximum use of the authorities provided by FISA and taking full advantage of developments in the law. Although, as we have previously explained, the Terrorist Surveillance Program fully complies with the law, the orders the Government has obtained will allow the necessary speed and agility while providing substantial advantages. Accordingly, under these circumstances, the President has determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires.

The Intelligence Committees have been briefed on the highly classified details of these orders. In addition, I have directed Steve Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, and Ken Wainstein, Assistant Attorney General for National Security, to provide a classified briefing to you on the details of these orders.

Sincerely,

/s/ ALBERTO R. GONZALES
ALBERTO R. GONZALES
Attorney General

cc: The Honorable John D. Rockefeller, IV
The Honorable Christopher Bond
The Honorable Sylvester Reyes
The Honorable Peter Hoekstra
The Honorable John Conyers. Jr.
The Honorable Lamar S. Smith

EXHIBIT G

Transcript: Debate on the foreign intelligence surveillance act

By Chris Robert /©El Paso Times

Article Launched: 08/22/2007 01:05:57 AM MDT

The following is the transcript of a question and answer session with National Intelligence Director Mike McConnell.

Question: How much has President Bush or members of his administration formed your response to the FISA debate?

Answer: Not at all. When I came back in, remember my previous assignment was director of the NSA, so this was an area I have known a little bit about. So I came back in. I was nominated the first week of January. The administration had made a decision to put the terrorist surveillance program into the FISA court. I think that happened the 7th of Jan. So as I come in the door and I'm prepping for the hearings, this sort of all happened. So the first thing I want to know is what's this program and what's the background and I was pretty surprised at what I learned. First off, the issue was the technology had changed and we had worked ourselves into a position that we were focusing on foreign terrorist communications, and this was a terrorist foreigner in a foreign country. The issue was international communications are on a wire so all of a sudden we were in a position because of the wording in the law that we had to have a warrant to do that. So the most important thing to capture is that it's a foreigner in a foreign country, required to get a warrant. Now if it were wireless, we

would not be required to get a warrant. Plus we were limited in what we were doing to terrorism only and the last time I checked we had a mission called foreign intelligence, which should be construed to mean anything of a foreign intelligence interest, North Korea, China, Russia, Syria, weapons of mass destruction proliferation, military development and it goes on and on and on. So when I engaged with the administration, I said we've gotten ourselves into a position here where we need to clarify, so the FISA issue had been debated and legislation had been passed in the house in 2006, did not pass the Senate. Two bills were introduced in the Senate, I don't know if it was co-sponsorship or two different bills, but Sen. (Dianne Feinstein, D-Calif.) had a bill and Sen. Specter had a bill and it may have been the same bill, I don't know, but the point is a lot of debate, a lot of dialogue. So, it was submitted to the FISA court and the first ruling in the FISA court was what we needed to do we could do with an approval process that was at a summary level and that was OK, we stayed in business and we're doing our mission. Well in the FISA process, you may or may not be aware . . .

Q: When you say summary level, do you mean the FISA court?

A: The FISA court. The FISA court ruled presented the program to them and they said the program is what you say it is and it's appropriate and it's legitimate, it's not an issue and was had approval. But the FISA process has a renewal. It comes up every so many days and there are 11 FISA judges. So the second judge looked at the same data and said well wait a minute I interpret the law, which is the FISA law, differently. And it came down to, if it's on a wire and it's foreign in a foreign

country, you have to have a warrant and so we found ourselves in a position of actually losing ground because it was the first review was less capability, we got a stay and that took us to the 31st of May. After the 31st of May we were in extremis because now we have significantly less capability. And meantime, the community, before I came back, had been working on a National Intelligence Estimate on terrorist threat to the homeland. And the key elements of the terrorist threat to the homeland, there were four key elements, a resilient determined adversary with senior leadership willing to die for the cause, requiring a place to train and develop, think of it as safe haven, they had discovered that in the border area between Pakistan and Afghanistan. Now the Pakistani government is pushing and pressing and attempting to do something about it, but by and large they have areas of safe haven. So leadership that can adapt, safe haven, intermediate leadership, these are think of them as trainers, facilitators, operational control guys. And the fourth part is recruits. They have them, they've taken them. This area is referred to as the FATA, federally administered tribal areas, they have the recruits and now the objective is to get them into the United States for mass casualties to conduct terrorist operations to achieve mass casualties. All of those four parts have been carried out except the fourth. They have em, but they haven't been successful. One of the major tools for us to keep them out is the FISA program, a significant tool and we're going the wrong direction. So, for me it was extremis to start talking not only to the administration, but to members of the hill. So from June until the bill was passed, I think I talked to probably 260 members, senators and congressmen. We submitted the bill in April, had an open hearing 1 May,

we had a closed hearing in May, I don't remember the exact date. Chairman (U.S. Rep. Silvestre Reyes, D-Texas) had two hearings and I had a chance to brief the judiciary committee in the house, the intelligence committee in the house and I just mentioned the Senate, did not brief the full judiciary committee in the Senate, but I did meet with Sen. (Patrick Leahy, D-Vt.) and Sen. (Arlen Specter, R-Pa.), and I did have an opportunity on the Senate side, they have a tradition there of every quarter they invite the director of national intelligence in to talk to them update them on topics of interest. And that happened in (June 27). Well what they wanted to hear about was Iraq and Afghanistan and for whatever reason, I'm giving them my review and they ask questions in the order in which they arrive in the room. The second question was on FISA, so it gave me an opportunity to, here I am worrying about this problem and I have 41 senators and I said several things. The current threat is increasing, I'm worried about it. Our capability is decreasing and let me explain the problem.

Q: Can't you get the warrant after the fact?

A: The issue is volume and time. Think about foreign intelligence. What it presented me with an opportunity is to make the case for something current, but what I was really also trying to put a strong emphasis on is the need to do foreign intelligence in any context. My argument was that the intelligence community should not be restricted when we are conducting foreign surveillance against a foreigner in a foreign country, just by dint of the fact that it happened to touch a wire. We haven't done that in wireless for years.

Q: So you end up with people tied up doing paperwork?

A: It takes about 200 man hours to do one telephone number. Think about it from the judges standpoint. Well, is this foreign intelligence? Well how do you know it's foreign intelligence? Well what does Abdul calling Mohammed mean, and how do I interpret that? So, it's a very complex process, so now, I've got people speaking Urdu and Farsi and, you know, whatever, Arabic, pull them off the line have them go through this process to justify what it is they know and why and so on. And now you've got to write it all up and it goes through the signature process, take it through (the Justice Department), and take it down to the FISA court. So all that process is about 200 man hours for one number. We're going backwards, we couldn't keep up. So the issue was . . .

Q: How many calls? Thousands?

A: Don't want to go there. Just think, lots. Too many. Now the second part of the issue was under the president's program, the terrorist surveillance program, the private sector had assisted us. Because if you're going to get access you've got to have a partner and they were being sued. Now if you play out the suits at the value they're claimed, it would bankrupt these companies. So my position was we have to provide liability protection to these private sector entities. So that was part of the request. So we went through that and we argued it. Some wanted to limit us to terrorism. My argument was, wait a minute, why would I want to limit it to terrorism. It may be that terrorists are achieving weapons of mass destruction, the only way I would know that is if I'm doing foreign intelligence by who might be providing a weapon of mass destruction.

Q: And this is still all foreign to foreign communication?

A: All foreign to foreign. So, in the final analysis, I was after three points, no warrant for a foreigner overseas, a foreign intelligence target located overseas, liability protection for the private sector and the third point was we must be required to have a warrant for surveillance against a U.S. person. And when I say U.S. person I want to make sure you capture what that means. That does not mean citizen. That means a foreigner, who is here, we still have to have a warrant because he's here. My view is that that's the right check and balances and it's the right protection for the country and lets us still do our mission for protection of the country. And we're trying to fend off foreign threats.

Q: So are you satisfied with it the way it is now?

A: I am. The issue that we did not address, which has to be addressed is the liability protection for the private sector now is proscriptive, meaning going forward. We've got a retroactive problem. When I went through and briefed the various senators and congressmen, the issue was alright, look, we don't want to work that right now, it's too hard because we want to find out about some issues of the past. So what I recommended to the administration is, 'Let's take that off the table for now and take it up when Congress reconvenes in September.'

Q: With an eye toward the six-month review?

A: No, the retroactive liability protection has got to be addressed.

Q: And that's not in the current law?

A: It is not. Now people have said that I negotiated in bad faith, or I did not keep my word or whatever . . .

Q: That you had an agenda that you weren't honest about.

A: I'll give you the facts from my point of view. When I checked on board I had my discussion with the president. I'm an apolitical figure. I'm not a Republican, I'm not a Democrat. I have voted for both. My job is as a professional to try to do this job the best way I can in terms of, from the intelligence community, protect the nation. So I made my argument that we should have the ability to do surveillance the same way we've done it for the past 50 years and not be inhibited when it's a foreigner in a foreign country. The president's guidance to me early in the process, was, 'You've got the experience. I trust your judgement. You make the right call. There's no pressure from anybody here to tell you how to do it. He did that early. He revisited with me in June. He did it again in July and he said it publicly on Friday before the bill was passed. We were at the FBI, it's an annual thing, we go to the FBI and do a homeland security kind of update. So he came out at noon and said, 'I'm requesting that Congress pass this bill. It's essential. Do it before you go on recess. I'm depending on Mike McConnell's recommendations. And that was the total sum and substance of the guidance and the involvement from the White House with regard to how I should make the call. Now, as we negotiated, we started with 66 pages, were trying to get everything cleaned up at once. When I reduced it to my three points, we went from 66 pages to 11. Now, this is a very, very complex bill. I had a team of 20 lawyers working. You can change a word in a paragraph and end up with some ma-

jor catastrophe down in paragraph 27, subsection 2c, to shut yourself down, you'll be out of business. So when we send up our 11 pages, we had a lot of help in making sure we got it just right so it would come back and we'd say wait a minute we can't live with this or one of the lawyers would say, 'Wait we tried that, it won't work, here's the problem.' So we kept going back and forth, so we sent up a version like Monday, we sent up a version on Wednesday, we sent up a version on Thursday. The House leadership, or the Democratic leadership on Thursday took that bill and we talked about it. And my response was there are some things I can't live with in this bill and they said alright we're going to fix them. Now, here's the issue. I never then had a chance to read it for the fix because, again, it's so complex, if you change a word or phrase, or even a paragraph reference, you can cause unintended . . .

Q: You have to make sure it's all consistent?

A: Right. So I can't agree to it until it's in writing and my 20 lawyers, who have been doing this for two years, can work through it. So in the final analysis, I was put in the position of making a call on something I hadn't read. So when it came down to crunch time, we got a copy and it had some of the offending language back in it. So I said, 'I can't support it.' And it played out in the House the way it played out in the House. Meantime on the Senate side, there were two versions being looked at. The Wednesday version and the Thursday version. And one side took one version and the other side took the other version. The Thursday version, we had some help, and I didn't get a chance to review it. So now, it's Friday night, the Senate's voting. They were having their debate and I still had not had a chance to review it. So,

I walked over, I was up visiting some senators trying to explain some of the background. So I walked over to the chamber and as I walked into the office just off the chamber, it's the vice president's office, somebody gave me a copy. So I looked at the version and said, 'Can't do it. The same language was back in there.'

Q: What was it?

A: Just let me leave it, not too much detail, there were things with regard to our authorities some language around minimization. So it put us in an untenable position. So then I had another version to take a look at, which was our Wednesday version, which basically was unchanged. So I said, well certainly, I'm going to support that Wednesday version. So that's what I said and the vote happened in the Senate and that was on Friday. So now it rolled to the House on Saturday. They took up the bill, they had a spirited debate, my name was invoked several times, not in a favorable light in some cases. (laughs) And they took a vote and it passed 226 to 182, I think. So it's law. The president signed it on Sunday and here we are.

Q: That's far from unanimous. There's obviously going to be more debate on this.

A: There are a couple of issues to just be sensitive to. There's a claim of reverse targeting. Now what that means is we would target somebody in a foreign country who is calling into the United States and our intent is to not go after the bad guy, but to listen to somebody in the United States. That's not legal, it's, it would be a breach of the Fourth Amendment. You can go to jail for that sort of thing. And If [*sic*] a foreign bad guy is calling into the United States, if there's a need to have a war-

rant, for the person in the United States, you just get a warrant. And so if a terrorist calls in and it's another terrorist, I think the American public would want us to do surveillance of that U.S. person in this case. So we would just get a warrant and do that. It's a manageable thing. On the U.S. persons side it's 100 or less. And then the foreign side, it's in the thousands. Now there's a sense that we're doing massive data mining. In fact, what we're doing is surgical. A telephone number is surgical. So, if you know what number, you can select it out. So that's, we've got a lot of territory to make up with people believing that we're doing things we're not doing.

Q: Even if it's perception, how do you deal with that? You have to do public relations, I assume.

A: Well, one of the things you do is you talk to reporters. And you give them the facts the best you can. Now part of this is a classified world. The fact we're doing it this way means that some Americans are going to die, because we do this mission unknown to the bad guys because they're using a process that we can exploit and the more we talk about it, the more they will go with an alternative means and when they go to an alternative means, remember what I said, a significant portion of what we do, this is not just threats against the United States, this is war in Afghanistan and Iraq.

Q. So you're saying that the reporting and the debate in Congress means that some Americans are going to die?

A. That's what I mean. Because we have made it so public. We used to do these things very differently, but for whatever reason, you know, it's a democratic process and sunshine's a good thing. We need to have the de-

bate. The reason that the FISA law was passed in 1978 was an arrangement was worked out between the Congress and the administration, we did not want to allow this community to conduct surveillance, electronic surveillance, of Americans for foreign intelligence unless you had a warrant, so that was required. So there was no warrant required for a foreign target in a foreign land. And so we are trying to get back to what was the intention of '78. Now because of the claim, counterclaim, mistrust, suspicion, the only way you could make any progress was to have this debate in an open way.

Q. So you don't think there was an alternative way to do this?

A. There may have been an alternative way, but we are where are . . .

Q. A better way, I should say.

A. All of my briefs initially were very classified. But it became apparent that we were not going to be able to carry the day if we don't talk to more people.

Q. Some might say that's the price you pay for living in a free society. Do you think that this is necessary that these Americans die?

A. We could have gotten there a different way. We conducted intelligence since World War II and we've maintained a sensitivity as far as sources and methods. It's basically a sources and methods argument. If you don't protect sources and methods then those you target will choose alternative means, different paths. As it is today al-Qaida in Iraq is targeting Americans, specifically the coalition. There are activities supported by other nations to import electronic, or explosively formed projec-

tiles, to do these roadside attacks and what we know about that is often out of very sensitive sources and methods. So the more public it is, then they take it away from us. So that's the tradeoff.

DIVERSITY IN THE INTELLIGENCE COMMUNITY

Q: I wanted to ask you about the diversity question. This has major ramifications here, we have this center of excellence program that's recruiting high school kids, many of whom wouldn't qualify if first generation American citizens weren't allowed.

A: So you agree with me?

Q: It does sound like something that would benefit this area that would also allow you to get people from here who are bicultural and have an openness to seeing things . . .

A: You're talking about Hispanics?

Q: Yes.

A: Hispanics are probably the most under-represented group if you think of America, what the ethic makeup of America, Hispanics are the most under-represented group in my community. Now, that said, and should increase that Hispanic population and programs like this will do that. That's why the outreach. But also we need, particularly with the current problem of terrorism, we need to have speakers of Urdu and Farsi and Arabic and people from those cultures that understand the issues of tribes and clans and all the things that go with understanding that part of the world. Varying religions and so on. Because it is, it's almost impossible, I've had the

chance to live in the Middle East for years, I've studied it for years, it's impossible to understand it without having some feel for the culture and so on. So while I'm all for increasing the diversity along the lines we talked about, I'm also very much in favor of first generation Americans from the countries that are causing issues and problems.

Q: What is the status of that program.

A: It is not in statue. It is not in policy. It has been habit. So we've stated, as a matter of policy, that we're not going to abide by those habits.

Q: And that's already the case?

A: Yes, and are we making progress? Not fast enough, but we will make progress over time.

Q: How do you measure that?

A: Very simple, you get to measure what are you and where are you trying go and are you making progress. I wrestled with this years ago when I was NSA. . . .

Q: You don't want quotas, though?

A: Quotas are forbidden so we set goals. My way of thinking about it is what is your end state? Now some would say that federal governments should look like America, whatever that is. OK, that sounded like a reasonable metric, so I said, 'Alright, what does America look like?' So I got a bunch of numbers. I said, 'Alright, what do we look like?' and it didn't match, and as I just told you, the one place where there's the greatest mismatch is Hispanic. It's much closer, as matter of fact, people would be surprised how close it is across, at least my community among the other minorities. Now, that

said, numbers don't necessarily equal positioning in the organization. So that's another feature we have to work on, is placement of women and minorities in leadership positions.

Q: So, you're quantifying that as well?

A: Yes.

TERRORIST ACTIVITY ON THE NATION'S SOUTHWEST BORDER

Q: There seems to be very little terrorist-related activity on the Southwest border, which is watched very closely because of the illegal immigration issue. Can you talk about why it's important to be alert here?

A: Let me go back to my NIE, those are unclassified key judgements, pull them down and look at them. You've got committed leadership. You've got a place to train. They've got trainers and they've got recruits. The key now is getting recruits in. So if the key is getting recruits in. So, if you're key is getting recruits in, how would you do that? And so, how would you do that?

Q: I'd go to the northern border where there's nobody watching.

A: And that's a path. Flying in is a path. Taking a ship in is a path. Coming up through the Mexican border is a path. Now are they doing it in great numbers, no. Because we're finding them and we're identifying them and we've got watch lists and we're keeping them at bay. There are numerous situations where people are alive today because we caught them (terrorists). And my point earlier, we catch them or we prevent them because we've got the sources and methods that lets us identify

them and do something about it. And you know the more sources and methods are compromised, we have that problem.

Q: And in many cases we don't hear about them?

A: The vast majority you don't hear about. Remember, let me give you a way to think about this. If you've got an issue, you have three potential outcomes, only three. A diplomatic success, an operational success or an intelligence failure. Because all those diplomatic successes and operations successes where there's intelligence contribution, it's not an intelligence success. It's just part of the process. But if there's an intelligence failure . . .

Q: Then you hear about it.

A: So, are terrorists coming across the Southwest border? Not in great numbers.

Q: There are some cases?

A: There are some. And would they use it as a path, given it was available to them? In time they will.

Q: If they're successful at it, then they'll probably repeat it.

A: Sure. There were a significant number of Iraqis who came across last year. Smuggled across illegally.

Q: Where was that?

A: Across the Southwest border.

Q: Can you give me anymore detail?

A: I probably could if I had my notebook. It's significant numbers. I'll have somebody get it for you. I don't remember what it is. The point is it went from a number

to (triple) in a single year, because they figured it out. Now some we caught, some we didn't. The ones that get in, what are they going to do? They're going to write home. So, it's not rocket science, word will move around. There's a program now in South America, where you can, once you're in South American countries, you can move around in South America and Central America without a visa. So you get a forged passport in Lebanon or where ever that gets you to South America. Now, no visa, you can move around, and with you're forged passport, as a citizen of whatever, you could come across that border. So, what I'm highlighting is that something . . .

Q: Is this how it happened, the cases you're talking about?

A: Yes.

EXHIBIT H

washingtonpost.com

A Law Terrorism Outran
We Need a FISA For the 21st Century

By Mike McConnell
Monday, May 21, 2007; A13

In 1978, the first cellular mobile phone system was still being tested, a personal computer's memory had just been expanded to 16 kilobytes and our greatest threat was the largest nation-state on Earth, the Soviet Union. That same year, the framework governing electronic surveillance of foreign powers and agents of foreign powers—the Foreign Intelligence Surveillance Act (FISA)—was signed into law.

Today, cellular phones are the size of credit cards, you would be hard-pressed to find a computer with memory less than 512 megabytes and our greatest threats are independent transnational terrorists and terror networks.

FISA was created to guard against domestic government abuse and to protect privacy while allowing for appropriate foreign intelligence collection. Technology and threats have changed, but the law remains essentially the same. If we are to improve our ability to protect the country by gathering foreign intelligence, this law must be updated to reflect changes in technology and the ways our adversaries communicate with one another.

Many Americans would be surprised at just what the current law requires. To state the facts plainly: In a

significant number of cases, our intelligence agencies must obtain a court order to monitor the communications of foreigners suspected of terrorist activity who are physically located in foreign countries. We are in this situation because the law simply has not kept pace with technology.

The failure to update this law comes at an increasingly steep price. The congressional joint inquiry into the Sept. 11, 2001, attacks recognized that there were systemic problems with covering communications of potential terrorists.

As director of national intelligence, I see every day the results of FISA-authorized activity and its contribution to our efforts to protect America. This surveillance saves lives—the lives of our children and grandchildren. I also see the flaws inherent in the current law.

Because the law has not been changed to reflect technological advancements, we are missing potentially valuable intelligence needed to protect America. We simply cannot predict how communications technology will change in the coming years, but these changes may widen the gap between the law and technology. We need to adopt that understanding into FISA—a law that does not address today's global systems in today's terms.

In seeking to update the law, in response to bipartisan congressional requests, the intelligence community is keeping faith with the foundation of credibility and legitimacy in which the law was grounded. Just as Congress in 1978 could not have anticipated today's technology, we cannot know how technology will advance in the next 30 years. Our job is to make the country as safe as possible by providing the highest possible quality intelli-

gence available. We should not tie the nation's security to a snapshot of outdated technology.

I am encouraged that in my discussions with members of Congress, and in congressional hearings on this subject over the past year, there is recognition of the need to improve our intelligence efforts and close critical gaps created by changes in technology. We will continue to collect intelligence under strong congressional, executive and judicial oversight mechanisms. Protecting our nation against terrorist attacks and safeguarding privacy protections and civil liberties is not an either/or proposition.

The first responsibility of intelligence is to achieve understanding and provide warning. As the head of the nation's intelligence community, it is my duty to encourage changes in policies, procedures and legislation to improve our ability to warn of terrorist attacks and other threats to our security. Bringing FISA into the 21st century is one such improvement that can and should be made now. The recommended changes will protect the civil and privacy rights of our citizens while enabling the U.S. intelligence community to provide a higher level of protection against terrorist attacks.

The writer is director of national intelligence.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Sept. 12, 2008

DECLARATION OF NAOMI KLEIN

I, Naomi Klein, declare:

1. I am a resident of Toronto, Canada, over the age of 18, and a citizen of the United States as well as Canada. I have personal knowledge of the facts stated in this declaration.

2. I am a journalist and syndicated columnist who contributes regularly to The Nation Magazine ("*The Nation*") as well as other publications. In addition, I have authored three books, *The Shock Doctrine: The Rise of Disaster Capitalism* (Metropolitan Books 2007), *No Logo* (Picador 2000), and *Fences and Windows: Dispatches from the Front Lines of the Globalization Debate* (Picador 2002). In 2004, my reporting from Iraq for *Harper's Magazine* won the James Aronson Award for Social Justice Journalism. In that same year I also released *The Take*, a feature documentary about Argentina's occupied factories that I co-produced with director Avi Lewis. This film was an official selection of the Venice Biennale and won the Best Documentary Jury Prize at the American Film Institute's Film Festival in Los Angeles. I am a former Miliband Fellow at the London School of Economics and I hold an honorary Doctor of Civil Laws from the University of King's College, Nova Scotia.

3. I have written dozens of articles for The Nation. Among the articles I have written for the magazine are *Bringing Najaf to New York*, Sept. 13, 2004 (about public debate in the U.S. relating to the war in Iraq); *The Threat of Hope in Latin America*, Nov. 2, 2005 (about the rising strength of indigenous movements in South America); and *Mutiny in Manila*, Aug. 14, 2003 (about how governments are using the war on terror to target peaceful protesters). Over the last few years, I have

written articles about, among other topics, social movements. indigenous rights, the wars in Afghanistan and Iraq, torture, surveillance in China, and the course and impact of globalization. I have written articles from Argentina, China, Sri Lanka, South Africa, Mexico, and Iraq.

4. My reporting is based largely on direct conversations with people who live or work in the places I write about. Many of these conversations are in-person; as an investigative reporter, I travel frequently to the places I write about. Often, however, these conversations are conducted by telephone or e-mail. Through telephone and e-mail communications, I develop sources, gather information, and check facts. When I reported on an increase in Mexican military activity in Chiapas, Mexico, for example, my U.S.-based research assistant and I made frequent telephone calls to Mexico in order to collect accurate and up-to-date information about what was taking place on the ground. Based in part on these telephone calls and e-mails, I ultimately published *Zapatista Code Red*, Dec. 20, 2007.

5. I understand that the FISA Amendments Act allows the government to acquire my international communications without a warrant so long as the surveillance is directed at people outside the United States. My understanding is that the new law permits the government to acquire my international communications even if there is no reason to believe that I or the people with whom I communicate are engaged in criminal activity or espionage. I also understand that the law permits the government to engage in "dragnet" surveillance—that is, to conduct surveillance that is directed not at

specific individuals or telephone numbers or e-mail addresses but at specific regions or countries.

6. I believe that at least some of my international communications are likely to be collected by the government under the new law. Because of the nature of my work, I communicate frequently with foreign political activists and political groups that are outspoken in their criticism of the U.S. government and its allies around the world and that engage in social protest to effect change. For example, I communicate with advocates for indigenous rights in Argentina. I also communicate with indigenous groups in Colombia that are working for agrarian reform. These groups, though opposed to the FARC guerrillas that are fighting against the U.S.-backed national government, have been outspoken in their criticism of U.S. policies and in particular of its trade policies and its provision of military assistance to the Colombian government.

7. My ability to gather information from political activists and others in countries like Mexico, Colombia, Ecuador, and the Philippines often depends on my ability to assure the people with whom I speak that I will be able to keep the content of our conversations, and in some cases their identities, confidential. Some of the people I speak to believe that the exposure of their political activities would make them vulnerable to retaliation by their own governments. Others fear that exposure would make them vulnerable to violence by non-state actors. These fears are not speculative. Many of the people with whom I speak live in countries that have criminalized peaceful social protest and dissent. Some have been persecuted, imprisoned, and even physically attacked for their political activities in the past.

8. Some of my sources will decline to share information with me if they believe that their communications are being monitored by the United States. In some cases they fear that the United States itself will retaliate against them for their political activities—for example, by placing them on "watch lists" and refusing them visas should they try to visit the United States. More often, though, they fear that the United States will share information about them with their own governments, and that their own governments will retaliate against them as a result. Many of my sources live under repressive governments that the United States supports economically and militarily.

9. The new surveillance law compromises my ability to gather information and therefore compromises my ability to do my job. As a result of the new law, some people who otherwise would have shared information with me will decline to do so. Some political activists may even see me as an extension of the U.S. government's intelligence community, since any information they share with me can be collected, retained, and analyzed by the U.S. government. Because I do not want to place my sources at risk, the new law will also force me to take measures to ensure that my sensitive communications remain confidential. For example, I will have to travel to gather information that I previously might have gathered by telephone or e-mail.

I declare under penalty of perjury under the laws of the United States and of the District of Columbia that the foregoing is true and correct.

/s/ NAOMI KLEIN
NAOMI KLEIN

Executed at Washington, D.C., on September 11, 2008.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Sept. 12, 2008

DECLARATION OF JOANNE MARINER

I, Joanne Mariner, declare:

1. I am a resident of New York, New York over the age of eighteen. I have personal knowledge of the facts stated in this declaration.

2. I am the Terrorism and Counterterrorism Program Director at Human Rights Watch ("HRW"). I received my law degree from Yale Law School and served as a law clerk to the Honorable Stephen R. Reinhardt of the United States Court of Appeals for the Ninth Circuit before joining HRW in 1994. I speak English, French, and Spanish.

3. HRW is a non-profit, non-governmental human rights organization based in New York City. It employs over 246 staff members located across offices in Brussels, Geneva, London, Moscow, Paris, Hong Kong, Johannesburg, Los Angeles, New York City, San Francisco, Tashkent, Toronto, and Washington, D.C. Formed in 1978, HRW is dedicated to protecting the human rights of people around the world. The hallmark of HRW's work is its commitment to even-handed, accurate reporting on human rights abuses throughout the globe.

4. HRW researchers conduct fact-finding investigations into human rights abuses by governments and non-state actors in all regions of the world. From these investigations—on topics ranging from the detention of peaceful demonstrators in Cairo by the Egyptian security forces following President Bush's visit, to the state of democracy in Ethiopia—HRW develops materials for publication. These materials often generate extensive coverage in local and international media. HRW also seeks dialogue with offending governments to encourage them to change abusive laws and policies, and enlists the

support of other influential actors such as the United Nations, the European Union, international financial institutions, the U.S. government, and others to achieve this end.

5. In connection with their research, reporting, and advocacy work, HRW's U.S.-based staff routinely exchange sensitive information by telephone and e-mail with individuals based abroad, including HRW staff as well as victims of human rights abuses, witnesses, experts, scholars, political activists, and foreign government officials. Because of the nature of HRW's work, some of the information we exchange by telephone and e-mail relates to terrorism and counterterrorism, and much of the information relates to the foreign affairs of the United States. For example, over the last few months alone, HRW researchers have exchanged information about the CIA's "rendition" program, the CIA's secret detention program, abuses committed by United States military contractors in Iraq and Afghanistan, and the Guantanamo Military Commissions. Our international communications are critical to our work. The information we exchange and collect through these communications provides the basis for much of our reporting and advocacy.

6. My own work at HRW, like the work of most other HRW researchers, is international in its scope. I have worked on a wide variety of issues for HRW, including war crimes in Colombia, Kosovo, and Darfur; political violence in Haiti; and the interface between terrorism and the laws of war. For example, I drafted HRW's 1999 submission to the House of Lords in connection with the Government of Spain's attempt to extradite General Augusto Pinochet from the United King-

dom to stand trial in Spain for crimes committed during the period when General Pinochet was head of state in Chile. I have also conducted advocacy before various U.N. bodies. For example, in July 2008, I was a panelist at the United Nations discussing human rights abuses taking place in the "war on terror." In September 2008, I participated as a panelist at a U.N. conference commemorating the 60th anniversary of the Universal Declaration of Human Rights. I have held numerous meetings with the staff of the Office of the U.N. High Commissioner for Human Rights to discuss and advocate in support of various human rights issues. I have also previously testified before the European Parliament on the CIA's secret detention program, and I am the author of two recent reports on CIA abuses: *Ghost Prisoner: Two Years in Secret CIA Detention* (2007) and *Double Jeopardy: CIA Renditions to Jordan* (2008).

7. In connection with my work at HRW, I communicate by telephone and e-mail with people all over the world, including in Jordan, Egypt, Pakistan, Afghanistan, the Gaza Strip, Morocco, the United Kingdom, and Argentina. For example, I routinely speak to HRW staff in London and Milan. I also communicate on occasion with HRW's Pakistan researcher, who is based in London and Pakistan. I also speak with translators, former detainees, lawyers for detainees, relatives of detainees, political activists, journalists, and fixers (people who have contacts in foreign countries and who are able to facilitate arrangements with those contacts and sometimes serve as translators).

8. Because of the nature of my work and the location and identities of the people I communicate with, I believe that at least some of my communications are

likely to be acquired by the U.S. government under the new surveillance law. Many of the people with whom I communicate are located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts—for example, in the Middle East, North Africa, Central Asia, and South Asia. In addition, I often communicate with people who have been targeted in some way by the U.S. government in the past. For example, some of the work I do involves trying to track down people who were rendered by the CIA to countries in which they were tortured; many of these people are people whom the CIA has said are (or were) associated with terrorist organizations. I also communicate with people who were formerly detained by the CIA or by intelligence services that work closely with the CIA. For example, I have communicated with people who were previously in CIA custody at Bagram Air Base and the "Dark Prison" in Afghanistan. I also communicate with members of political groups that are targeted by their own governments as well as by the United States. For example, I have communicated with members of Muslim groups located in Jordan and Egypt.

9. My work depends on my ability to assure the people with whom I communicate that their communications with me (and in some cases even their identities) will be kept confidential. In order to document human rights abuses, I need to gather facts from people who have first-hand knowledge of those abuses. Over ten years of experience as human rights attorney and researcher has taught me that victims of human rights abuses are often reluctant to share those facts. Some of them have been severely humiliated by what they have faced and want to avoid bringing more attention to themselves. Others fear that reporting abuse will make

them vulnerable to further abuse. Many of the people with whom I communicate fear reprisals from their own governments, from non-governmental actors (including terrorist organizations), and from the U.S. government. These individuals share information with me because they trust me to treat their information with appropriate sensitivity. Frequently, witnesses, experts, and foreign government officials who share information with me also insist that their identities be kept confidential. They, too, often have concerns about possible reprisals.

10. By significantly increasing the likelihood that my communications will be acquired by the U.S. government, the new surveillance law compromises my ability to gather information that is relevant and necessary to my work. Many of the people with whom I communicate will not share information with me if they believe that by sharing information with me they are also sharing information with the U.S. government—and with any other government, intelligence service, or organization to which the U.S. government chooses to disseminate the information. The new surveillance law means that it will be more difficult for me to gather information. In some cases I will have to travel abroad to gather information that I would otherwise have gathered by telephone or e-mail. Such travel is time-consuming and costly. Because of the nature and geographic focus of my work, such travel can also be dangerous—not only for me but for the people with whom I meet. In some cases I will not be able to gather information that I need in order to make my research comprehensive and my advocacy effective.

11. Given the nature and geographic focus of my work, the risk of government surveillance is not entirely

new, and I have always used passwords and encryption to protect the confidentiality of my information and communications. In the past, however, U.S. government surveillance was both narrow and judicially supervised. I am concerned that now the U.S. government may be able to engage in almost entirely unsupervised surveillance and this surveillance can be directed very broadly and at anyone at all—at political dissidents, foreign government officials, witnesses, experts, human rights organizations (including, for example, Human Rights Watch's counterparts in other countries), or even victims of human rights abuses who are not suspected of having done anything wrong. This kind of unchecked surveillance has much more significant implications for my work and the work of other human rights researchers. A risk that was previously limited to a subset of communications with a small subset of people is now a risk that we must evaluate and address every time we make an international telephone call or send an e-mail to an individual located abroad.

12. I recognize that the government has a legitimate interest in collecting information about people who pose a threat to national security. However, I believe that the government's surveillance activities should be subject to meaningful safeguards and oversight. In the course of my work in other countries, I have seen the way that unchecked government surveillance can erode the institutions of democracy. I am participating in this lawsuit because I do not want to see the same erosion take place here in the United States.

I declare under penalty of perjury under the laws of the United States and of the State of New York that the foregoing is true and correct.

/s/ JOANNE MARINER
JOANNE MARINER

Executed at New York, New York, on September 9, 2008.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Sept. 12, 2008

DECLARATION OF SYLVIA ROYCE

I, Sylvia Royce, declare:

1. I am a resident of the District of Columbia over the age of 18. I have personal knowledge of the facts stated in this declaration.

2. I am an attorney in private practice. From 1977 to 1982, I was an Assistant U.S. Attorney for the District of Columbia. I then served from 1982 to 2000 in the Criminal Division and the Civil Division of the U.S. Department of Justice, where I was Chief of International Prisoner Transfer from 1995 to 2000. I am a member of the District of Columbia Bar and the National Association of Criminal Defense Lawyers. I am also on the list of counsel qualified to represent persons accused of crimes before the International Criminal Court in the Hague.

3. My law practice includes the representation of individuals imprisoned in the United States who are seeking to be transferred to their home countries to serve out the remainder of their prison sentences. I also represent Mohammedou Ould Salahi, a prisoner who has been held at Guantánamo Bay as an enemy combatant since 2002, in connection with a pending habeas corpus petition and lawsuit that he filed in the United States District Court for the District of Columbia, No. 1:05-cv-569, and in connection with other lawsuits he has filed pursuant to the Freedom of Information Act and the Detainee Treatment Act. I have been representing Mr. Salahi *pro bono,* and hence at my own expense, since February 2005.

4. Mr. Salahi is a citizen of Mauritania who formerly lived in Germany and Canada, where he obtained landed immigrant status. The United States alleges that

he acted as a liaison between al Qaeda members close to Osama bin Laden and a group of Islamic radicals living in Hamburg, Germany, some of whom planned or participated in the September 11 attacks.

5. In connection with my representation of Mr. Salahi, I engage in international telephone and e-mail communications that the government could acquire under the FISA Amendments Act. Because of the nature of my communications, the identities and locations of the people with whom I communicate, and the scope of the new law, I believe that my international communications are likely to be acquired under the new law. The possibility that my communications will be acquired compromises my ability to gather information relevant to my representation of Mr. Salahi, to consult with co-counsel about legal strategy, and to exchange information relating to Mr. Salahi's case with human rights researchers and the media. In connection with my representation of Mr. Salahi, I receive calls from time to time from Mr. Salahi's brother, Yahdih Ould Salahi, who is a university student in Germany. During these calls, I speak to Yahdih about the American judicial system and the progress of the case, and about how the client is adapting to the conditions of detention from a health and psychological point of view. Because of the nature of the allegations against Mr. Salahi and the fact that Mr. Salahi is currently detained at Guantánamo Bay, my communications with Yahdih generally relate to international terrorism and the foreign affairs of the United States. I am particularly concerned that my communications with Yahdih will be acquired because the U.S. government has shown an interest in Mr. Salahi's family in the past. Specifically, during his interrogation, the government interrogators told Mr. Salahi that his family

members would be arrested and mistreated if he did not cooperate. The Justice Department's Inspector General exhaustively documented Mr. Salahi's treatment in U.S. custody in a May 2008 report. Office of the Inspector General, Dep't of Justice, *A Review of the FBI's Involvement in and Observation of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq* (May 2008).

6. I also exchange calls and emails concerning Mr. Salahi's case with co-counsel Brahim Ould Ebety, a Mauritanian attorney, and Emmanuel Altit, a French barrister. In these communications, we discuss, among other things, legal strategy and the U.S. government's policies with respect to the detention of prisoners at Guantánamo Bay. These communications are extremely important to my representation of Mr. Salahi for at least two reasons. First, when detainees have been released in the past, a significant factor contributing to their release has been pressure from foreign governments. My communications with co-counsel abroad are an important means of gauging whether we have information that may help build such pressure. Second, when and if the government releases Mr. Salahi, he will want to go back to Mauritania. The conditions he will face at that time potentially range from freedom through conditional release to incarceration. I need to talk to Mr. Ebety to evaluate these conditions—the more so now that the regime governing Mauritania has abruptly changed due to a coup.

7. The risk that the government will monitor my communications with co-counsel puts me in a dilemma: I would like to have an open exchange of views on legal strategy with my co-counsel, but I have a duty not to allow client confidences and legal strategy to be cap-

tured by persons outside the attorney-client relationship, and least of all by the U.S. government, which in this case is the opposing party. To protect my client, my co-counsel and I are compelled to limit the information we share by telephone and e-mail. In some instances, my co-counsel and I exchange generalities rather than specifics. In some instances we decide that we cannot exchange the relevant information at all. Where information is both especially important and especially sensitive, I have to travel to share information, views and ideas that I would otherwise have been able to exchange by telephone or e-mail. Most recently, I went to New York City to meet with Mr. Altit and another lawyer to talk about Mr. Salahi's case, but I also expect to travel abroad in the future to meet with co-counsel and I expect to exchange information in our meetings in person that I would not exchange by telephone or e-mail.

8. In connection with my representation of Mr. Salahi, I also communicate with foreign journalists working for print media such as *Der Spiegel* and the Toronto *Globe and Mail,* and with human rights organizations with offices outside the United States. These communications include discussions of the policies of the U.S. government relating to the detention and interrogation of enemy combatants, the connections or lack thereof between my client and others held at Guantánamo, and the propriety or impropriety of government decisions with respect to classification of national security information. My journalistic and human rights contacts approach me from time to time with information they have obtained by interviewing persons whose testimony may be material to Mr. Salahi's case. Again, because of the nature of the allegations against Mr. Salahi and the fact that Mr. Salahi is detained at Guantánamo

Bay, many of these communications relate to international terrorism or the foreign affairs of the United States. The increased risk of government surveillance means that in some cases journalists and researchers will limit the information they share with me, or that I must limit the information I share with them. For example, in a recent telephone call I cut off a German journalist because the information we were discussing, which related to a potential witness, was not something to which I would want the government to be privy.

9. In sum, the new law compromises my ability to gather information that is relevant and necessary to my representation of Mr. Salahi, to consult with co-counsel about legal strategy, and to exchange information relating to Mr. Salahi's case with human rights researchers and journalists. The new law substantially undermines my ability to represent my client.

I declare under penalty of perjury under the laws of the United States and of the District of Columbia that the foregoing is true and correct.

/s/ SYLVIA ROYCE
SYLVIA ROYCE

Executed at Washington, D.C., on September 4, 2008.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Sept. 12, 2008

DECLARATION OF JOHN WALSH

I, John Walsh, declare:

1. I am a resident of Washington, D.C., over the age of eighteen. I have personal knowledge of the facts stated in this declaration.

2. I received a B.A. in Theology from Georgetown University and an M.A. in Public Policy from Johns Hopkins University. I am currently the Senior Associate responsible for Andes and Drug Policy at the Washington Office on Latin America ("WOLA"), which is located in Washington, D.C. My responsibilities include research and advocacy on U.S. policy towards the Andean region, especially as it relates to democracy, drug policy and human rights issues. I also conduct research and advocacy on U.S. drug policy in relation to Mexico and Central America, and in relation to the United Nations drug control system.

3. Founded in 1974, WOLA is a non-governmental organization (NGO) that promotes human rights, democracy, and social justice in Latin America, with a focus on U.S. foreign policy toward the region. With a staff of approximately twenty, WOLA works closely with human rights and social justice activists from across Latin America, as well as with government officials, community leaders, and academics. WOLA serves as a resource for Latin American NGOs and as a valuable interlocutor between them and U.S. policymakers. WOLA plays a leadership role in several advocacy coalitions, and organizes workshops, conferences, roundtables, and briefings designed to stimulate debate and policy reform. In all of our work, WOLA seeks to influence U.S. policy toward Latin America and to influence the policies and practices of Latin American governments in support of the defense of human rights, the consolida-

tion of democracy, and equitable economic growth. WOLA also works to fortify the capacity of civil society organizations in Latin America so that they may also develop and advocate policies to achieve these aims.

4. WOLA is participating in this lawsuit because the FISA Amendments Act compromises our ability to conduct research and advocacy. It is our understanding that the new law permits the U.S. government to conduct, foreign intelligence surveillance that is directed not at specific individuals, telephone numbers, and e-mail addresses but rather at specific regions or even countries, thereby sweeping up millions of conversations into a dragnet. We also understand that the law allows the U.S. government to acquire our international communications without a warrant so long as the surveillance is directed at people outside the United States—even if there is no reason to believe that we or the people with whom we communicate are engaged in criminal activity or espionage.

5. I believe that my communications, and the communications of my colleagues at WOLA, are likely to be acquired under the new law. In carrying out WOLA's mission, I and other WOLA staff frequently communicate by telephone and e-mail with individuals located abroad, especially in countries where WOLA is most active, including Argentina, Bolivia, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Peru, and Venezuela. The relationship between the U.S. government and the governments of some of these countries is antagonistic. Many Venezuelans, for example, believe that the U.S. government actively supported the April 2002 coup attempt against their democratically elected president, Hugo Chavez. Because the

relationship between the United States and Venezuela's Chavez's administration is hostile, the U.S. government certainly has a motive for monitoring the activities and communications both of people associated with or supportive of Chavez's administration and of critics or dissidents opposed to it. I am in contact with people who fall into both categories. In my communications with them, we routinely discuss issues relating to the relationship between Venezuela and the United States and U.S. foreign policy more generally. As I understand the new law, there is nothing that would prevent the U.S. government from "targeting" my contacts in Venezuela in order to collect the very information that I am exchanging with them.

6. WOLA staff members also communicate with individuals in El Salvador who have been charged with crimes under that country's broadly-written anti-terrorism legislation, which allows the attorney general to seek lengthy prison terms for demonstrators who participate in social protests during which confrontations may occur. In connection with our research and advocacy around the issue of the criminalization of social protest in El Salvador, WOLA staff members have communicated via e-mail and phone with leaders of the protest movement, some of whom were charged under the anti-terrorism statute. Because social protest has been linked to terrorism in this context, I believe that our e-mail and telephone communications with contacts in El Salvador are likely to be intercepted under the challenged law.

7. I and my colleagues at WOLA depend on our ability to communicate confidentially via telephone and e-mail to forge strong relationships with individuals and

organizations abroad. These relationships, and the communications they engender, are essential to our ability to provide insightful and well-grounded analysis to Congress, the administration, the media, and the broader public. Especially in countries in which politics and violence are intertwined, the confidentiality of our international communications is integral to our research, advocacy, and coalition-building work.

8. Many of WOLA's partners and sources share information with us on condition that we keep their identities confidential. I recently completed an in-depth study, entitled "Chemical Reactions," about the aerial herbicide spraying operations ("fumigation") that have been the centerpiece of the Colombian government's effort to curb coca cultivation and cocaine production. The fumigation program has received strong financial, logistical and political support from the U.S. government under both the Clinton and G.W. Bush administrations. Our report was highly critical of the program, concluding that spraying has contributed to the spread of coca cultivation to more remote regions, thereby exacerbating the adverse effects of drug production and drug control on human health and the environment. In order to complete this study, I communicated frequently with Colombian experts with scientific training and extensive field experience in conservation and rural development. These experts have held important positions in Colombian state agencies, as well as at NGOs. I met with them in person in Colombia, but I also communicated with them by telephone and we exchanged drafts of the report by e-mail. Certain of these experts, especially those who had access to information by virtue of their past or current government positions, did not want their involvement publicized and would have been reluc-

tant to communicate with me by telephone or e-mail if they believed it likely that their identities would be disclosed to the U.S. government as a result. Some of my contacts feared they would lose their access to vital information if their identities were publicized. Others feared that disclosure of their identities would invite the attention of illegal armed groups that are active in coca cultivation, drug trafficking, and organized crime along Colombia's Pacific coast where they often conduct their research.

9. Confidentiality is also essential to my work in connection with WOLA's global drug policy advocacy. As part of this work, other WOLA staff and I have been directly involved in facilitating off-the-record dialogues on drug policy involving Latin American and European government officials and non-governmental experts. The aim is to influence ongoing drug policy deliberations at the United Nations that will conclude with a high-level ministerial meeting and a new UN political declaration in March 2009 that is meant to set the agenda for the next decade of global drug control policy. Our partner in organizing these informal dialogues is the Transnational Institute (TNI), an NGO based in the Netherlands. The four dialogues we have held to date have been hosted by the governments of Uruguay, Mexico, Ecuador and Bolivia; another session is being planned for Brazil. Many of the proposals discussed at the dialogues emphasize human rights protections, harm reduction approaches, and alternative livelihoods strategies that are very much at odds with official U.S. positions. While the dialogues themselves take place in person and entirely off-the-record, the preparation and the follow-up is all done by telephone and e-mail, and involves communications with NGOs, academics and government offi-

cials in numerous Latin American and European countries. The success of these dialogues on controversial issues depends on our ability to communicate confidentially and frankly with our NGO partners and with participating government officials.

10. By greatly increasing the likelihood that my international communications will be acquired, retained, analyzed and disseminated by the U.S. government, the new surveillance law infringes on my ability to build coalitions and gather information that is essential to my advocacy work. Many of my professional contacts live in extremely dangerous and polarized environments. Therefore, it is crucial that they be perceived as neutral or non-aligned actors. For example, in an atmosphere of mutual hostility between the current U.S. and Venezuelan governments, with rhetoric on the part of Venezuelan officials portraying government critics and opponents as allies and agents of the U.S. government, the mere suspicion that communications undertaken in confidence with me may be secretly accessed by the U.S. government, without meaningful oversight, threatens to chill the candid communications central to my work. If the U.S. government is monitoring or even perceived to be monitoring my communications, my professional contacts will be reluctant to candidly share information crucial to understanding events and trends on the ground in the region. Similarly, many participants in the international drug policy dialogues discussed above will be reluctant to continue their discussions with me and other WOLA staff members if they believe our communications are being monitored. Without their input, feedback, and support, it will be much more difficult for WOLA to develop common international strategies to promote much-needed drug policy reform.

11. The threat of U.S. surveillance has particularly grave consequences for WOLA's work in Cuba, the only Latin American country included on the U.S. State Department's list of state sponsors of terrorism. Because of increased travel restrictions, over the last few years it has become harder for Cubans to enter the United States and for U.S. citizens to enter Cuba. As a result, WOLA staff rely heavily on telephone and e-mail to communicate with individuals living in Cuba. Many of our contacts in Cuba believe that their calls could be monitored by the Cuban government. While this limits their ability to speak freely to us about Cuban government policy, in the past our Cuban contacts have been willing to discuss U.S. policy—and in particular the long-standing U.S. embargo—quite freely by both telephone and e-mail. The FISA Amendments Act threatens to curtail that communication drastically because many Cubans who are critical of U.S. policy, both dissidents and non-dissidents, believe that they will be denied visas to the United States if they express their opposition to the U.S. embargo. If these individuals believe that their discussions about U.S. policy toward Cuba may be monitored by U.S. officials, it will be far more difficult for us to have frank and useful conversations with Cubans about their views toward U.S. policy.

12. While some of WOLA's contacts and partner organizations abroad may communicate with us less regularly and less candidly if they believe their communications with WOLA are likely to be intercepted by the U.S. government, those who do not know WOLA as well may be reluctant to enter into communication with us at all. This threatens to hamper WOLA's work, which aims to build support among Latin American governments

and civil society organizations for rights-respecting reform.

13. In sum, my work—and the work of WOLA more generally—fundamentally relies on U.S.-to-international communications both via e-mail and telephone. It will be far more difficult for WOLA to pursue its work in Latin America on these very important issues if our partners believe that the U.S. government is able to intercept or gather our communications without meaningful oversight or limit.

I declare under penalty of perjury under the laws of the United States and of the District of Columbia that the foregoing is true and correct.

/s/ JOHN WALSH
JOHN WALSH

Executed at Washington, D.C., on September 11, 2008.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Dec. 15, 2008

DECLARATION OF CHRISTOPHER L. HEDGES

I, Christopher L. Hedges, declare:

1. I am a resident of Princeton, New Jersey over the age of eighteen. I have personal knowledge of the facts stated in this declaration.

2. I am a journalist and author specializing in American and Middle Eastern politics and society. I contribute regularly to *The Nation Magazine* ("*The Nation*"), and I am a senior fellow at The Nation Institute. My reporting has also appeared in the *New York Times*, *Christian Science Monitor*, *National Public Radio*, *Dallas Morning News*, *Foreign Affairs*, *Harper's Magazine*, *New York Review of Books*, *Granta*, *Mother Jones*, *New Humanist*, and *Truthdig*. I am also the author of numerous books, including *American Fascists: The Christian Right and the War on America* (2007) and *I Don't Believe in Atheists* (2008). I was part of the *New York Times* team that won the 2002 Pulitzer Prize for the paper's coverage of global terrorism, and I received the 2002 Amnesty International Global Award for Human Rights Journalism. I graduated from Colgate University with a degree in English literature and received a Masters in Divinity from Harvard University. I have taught at Columbia University, Princeton University, and New York University. In addition to English, I speak Arabic, French, and Spanish, and I know Latin and ancient Greek.

3. I have been reporting on topics involving international and civil conflict since 1983. In my work as a reporter, I have spent significant time in Latin America, the Middle East, and Europe, including four years as the Middle East Bureau Chief for the *New York Times*. In all, I have reported from more than fifty countries.

4. In connection with my reporting and writing, I maintain regular contact with individuals around the world, including contacts in Iran, Syria, Libya, Kosovo, Bosnia, Sudan, and Palestine. I communicate with a wide range of individuals, including academics, journalists, and political leaders. Such contacts are vital to my work: in order report to [*sic*] on areas of ongoing conflict, I must receive information from individuals with firsthand knowledge of unfolding events. Typically, these communications occur over e-mail.

5. I understand that the FISA Amendments Act ("FAA") allows the U.S. government to acquire my international communications without a warrant so long as the surveillance is directed at people outside the United States. My understanding is that the new law permits the government to acquire my international communications even if there is no reason to believe that I am, or the people with whom I communicate are, engaged in criminal activity or espionage. I also understand that the law permits the government to engage in "dragnet" surveillance—that is, to conduct surveillance that is directed not at specific individuals or telephone numbers or e-mail addresses but at specific regions or countries.

6. My work as a journalist covering foreign affairs exposed me to some risk of government surveillance even before passage of the FAA. But the FAA increases this risk dramatically because it permits dragnet, suspicionless surveillance rather than surveillance that is directed at individuals suspected of wrongdoing. Before passage of the FAA, I operated according to the belief that any potential surveillance would be subject to strict limitations, including judicial supervision, individualized suspicion and probable cause, and judicially approved

procedures to minimize unjustified invasion into my correspondences. Now I have no choice but to assume that *any* of my international communications may be subject to government surveillance, and I have to make decisions about whether and how to engage in particular communications in light of that assumption.

7. I believe that at least some of my international communications are likely to be collected by the government under the new law. My work requires me to follow closely events in many of the world's conflict zones. Many of the topics, regions, and individuals I report on are of demonstrated interest to the U.S. government. For example, I report extensively on the plight of Palestinians, and in doing so I maintain contact with some individuals—including journalists, political activists, and representatives of civil society organizations—who I believe are of interest to the U.S. government. This is not to say that these individuals are suspected of criminal activity; they are not. But they have information in which the U.S. would be interested (for example, information about positions taken by various political factions in Palestine), and in the past they have shared information with me.

8. My ability to gather information from sources in conflict zones is severely impaired if I cannot guarantee confidentiality. The FAA severely limits my ability to communicate by phone and e-mail with foreign sources. Many substantive areas of discussion are curtailed due to my concerns that my international communications will be intercepted by the U.S. government, and in some cases I must refrain from discussions about the location or contact information of my sources. Many of my sources communicate with me at great peril. They often

criticize the organizations or groups they are affiliated with or pass on information which challenges official narratives of events. If the information they provide is handed to governments or organizations they are affiliated with, or who have control over them, they could suffer interrogation, imprisonment and even death. Fear of surveillance by the U.S. government has a profound impact on much of the work that I do as an author, journalist, and professor.

9. The financial cost and time required to speak with many of my contacts is now immense. In many instances I can, at this point, communicate with them only in person. No other form of communication can be trusted. This has made my work very difficult and often requires me to travel to see those who have information. When I do communicate by e-mail or telephone, I am forced to keep the discussion away from topics that could jeopardize the person with whom I'm communicating. I have to assume that any international communication could be acquired by the U.S. government and perhaps passed on to foreign governments or foreign intelligence services. This limits my ability to gather information in the first place. The FAA has far-reaching consequences for my work, just as it does for other journalists who do the kind of work I do.

I declare under penalty of perjury under the laws of the United States and of the State of New Jersey that the foregoing is true and correct.

/s/ CHRISTOPHER L. HEDGES
Christopher L. Hedges

Executed at Princeton, NJ, on December 11, 2008

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Dec. 15, 2008

DECLARATION OF SCOTT McKAY

I, Scott McKay, declare:

1. I am a resident of Boise, Idaho over the age of eighteen. I have personal knowledge of the facts stated in this declaration.

2. I am a named partner in the law firm of Nevin, Benjamin, McKay & Bartlett LLP, and my practice encompasses both criminal defense and civil litigation. In 1990, I graduated *magna cum laude* from Gonzaga University School of Law where I served as an associate editor on the *Gonzaga Law Review*. Following law school, I served as a law clerk to the Honorable Byron J. Johnson and later the Honorable Linda Copple Trout of the Idaho Supreme Court. I am also a member of the Idaho and National Associations of Criminal Defense Lawyers.

3. I have a breadth of litigation experience and have successfully represented clients in a number of significant cases. I received the Clarence Darrow Award from the American Civil Liberties Union of Idaho for the defense of a Saudi national, Mr. Sami Omar Al-Hussayen, who was acquitted in June 2004 on terrorism charges following a lengthy trial in federal court. My law partner, David Nevin, and I presently work with detailed military defense counsel on the defense of Mr. Khalid Sheik Mohammed and, in that regard, we both have been appearing before the Military Commissions at Guantánamo Bay, Cuba. We also work on complex civil litigation and for the past several years, we both have been involved in federal multi district litigation arising out of the events of September 11, 2001, which has been consolidated and is now pending in the Southern District of New York. In this litigation, Mr. Nevin and I again represent Mr. Al-Hussayen, who, in addition to facing

criminal charges after September 11, was named as a defendant in several civil cases.

4. I have joined this lawsuit because the FISA Amendments Act ("FAA") renders my and other members of my law firm's international communications, including sensitive and privileged communications, susceptible to dragnet monitoring by the U.S. government. Because of the nature of our work and the identities of our clients, I believe that my communications are virtually certain to be monitored under the FAA. The threat of surveillance requires me to take expensive and time-consuming measures to protect the confidentiality of my communications and substantially impairs my ability to gather information that is necessary to my representation of our clients.

5. In connection with my firm's representation of Mr. al-Hussayen, Mr. Nevin and I communicate by telephone and email with people outside the United States, including Mr. Al-Hussayen himself, who now resides in Saudi Arabia. These communications are necessary to our representation of Mr. Al-Hussayen. All of them are sensitive, and some of them are privileged. The communications concern litigation strategy and other matters relevant to the litigation involving Mr. Al-Hussayen.

6. My concern that our communications with and regarding Mr. Al-Hussayen will be monitored by the U.S. government is augmented by my knowledge that Mr. Al-Hussayen's communications have been monitored in the past. I learned during the course of defending Mr. Al-Hussayen against federal criminal charges in Idaho that the U.S. government had intercepted some 10,000 telephone calls and 20,000 email communications involving Mr. Al-Hussayen.

7. Our representation of Mr. Mohammed also requires Mr. Nevin and me to engage in international communications by telephone and email. In connection with our representation of Mr. Mohammed before the Military Commissions at Guantánamo, we communicate by telephone and email with experts, investigators, attorneys, family members of Mr. Mohammed and others who are located abroad. All of these communications are sensitive, and some of them are privileged. The communications concern litigation strategy and other matters relevant to the litigation involving Mr. Mohammed.

8. Because I believe that the government will monitor my communications under the FAA, I have had to take measures to protect the confidentiality of information that I believe is particularly sensitive. For example, I minimize the amount of sensitive information that I communicate by telephone or email. Whenever possible, I also collect information in person rather than by telephone or email. I understand that Mr. Nevin has taken similar measures for the same reasons. I further understand that the government has said that lawyers who take such measures to protect sensitive information are taking measures that are "voluntary," but these measures are ethically required. The rules of professional responsibility for Idaho—and, as far as I am aware, for every other jurisdiction in which I practice—require attorneys to maintain the confidentiality of clients' private information. The rules also require attorneys to be reasonably prepared (which in turn requires attorneys to obtain information from their clients) and to keep their clients informed about developments in their cases. I do not see how I can ethically ask clients to share sensitive information with me over the telephone or by email, or how I can ethically share sensitive

information with my clients, when there is a substantial risk that the U.S. government—in some cases the very government that is prosecuting or has prosecuted my clients—may be monitoring the communications.

9. The confidentiality of our international communications is integral to our work. The communications we have with clients are, of course, ordinarily protected from disclosure by the attorney-client privilege—a privilege that is recognized under both federal and state law. Additionally, communications we have with potential fact witnesses, experts, investigators, other lawyers, journalists, government officials, political figures, and other third parties outside the United States may also be protected from disclosure by the attorney work-product doctrine. The confidentiality of our international communications is integral to our ability to gather information and make informed decisions concerning legal strategy.

10. The measures that we take in order to protect the confidentiality of sensitive information are far from costless. Collecting information in person sometimes requires travel that is both time-consuming and expensive. In some cases, of course, travel is impractical or prohibitively expensive, which means that we are faced with a choice between asking experts, investigators or witnesses to share sensitive information over the phone or by email or alternatively, forgoing the information altogether. This has a real effect on our ability to properly represent our clients. Beyond our own reluctance to exchange sensitive information by telephone or email, the U.S. government's surveillance activities affect the willingness of others—including clients—to share information with us. The duty of confidentiality is one of the

bases for trust between an attorney and his or her client. By depriving attorneys of their ability to assure confidentiality, the government makes trust much more difficult if not impossible. For example, since Mr. Al-Hussayen returned to Saudi Arabia, he keeps our communications to a minimum and generally avoids substantive communications concerning his case.

11. The FAA affects the way we practice law and significantly compromises our ability to represent our clients. Moreover, the effect of the FAA on our practice is likely to become more severe over time. If the few remaining cases against Mr. Al-Hussayen in the September 11 civil litigation survive pending motions to dismiss and proceed to discovery, I expect our international communications to become even more central to our practice than they are already; we will have to communicate regularly with Mr. Al-Hussayen himself as well as with witnesses, experts, and others based abroad. The ethical dilemmas that we already confront will present themselves even more acutely, because it will be prohibitively expensive for one of us to travel to Saudi Arabia every time we need to gather sensitive information from our client or share sensitive information with him.

12. Similarly, international communications are likely to become even more central to our representation of Mr. Mohammed, who is charged with capital offenses in the Military Commissions at Guantánamo Bay, Cuba. The charging document at issue in Mr. Mohammed's Military Commissions case contains allegations of international terrorism and an alleged criminal conspiracy involving the events of September 11, 2001, al Qaeda, various charged and uncharged co-conspirators, and acts taking place in a number of countries. According to

various media reports and public source materials, Mr. Mohammed was captured in Pakistan in March, 2003 and held in the custody of the Central Intelligence Agency at undisclosed locations until his transfer to Guantánamo Bay, Cuba in September 2006. Investigating the foregoing matters and properly assisting in the defense of Mr. Mohammed will require extensive further communication by telephone and email with individuals located abroad. Additionally, given that these are capital proceedings against Mr. Mohammed involving the possibility of a death sentence, extensive investigation will need to be conducted into his history and background. Since Mr. Mohammed is not a U.S. citizen and resided abroad, this aspect of our representation will necessitate frequent contact by telephone and email with individuals located abroad.

13. It is true, of course, that the danger of government surveillance has always presented difficult questions for criminal defense attorneys. In this respect, the FAA does not present concerns that are altogether new. For a criminal defense attorney, however, the concerns raised by dragnet surveillance of international communications are far more serious than the concerns raised by surveillance that is based on individualized suspicion and subject to individualized judicial oversight. In the past, I have understood that certain of my communications with experts, witnesses, clients, and others could be subject to surveillance by the U.S. government, but I have also understood that this surveillance was strictly limited, judicially supervised, and subject to minimization procedures that were also supervised by judges on an individualized basis. I understood that the government had the authority to monitor my communications in certain narrow circumstances, but now my communications

may be monitored simply because I am communicating with someone who is outside the country. Moreover, the minimization procedures that exist under the new statute are not supervised by judges on an individualized basis and there is therefore no serious restriction on the government's retention and dissemination of information obtained through surveillance.

14. Because of the FAA, we now have to assume that every one of our international communications may be monitored by the government. With respect to every single international communication, we have to make an assessment of whether our client's interest would be compromised if the government were to acquire the communications. If the answer is yes, we have to forgo the communication altogether or find a way of collecting the information we need (or conveying the information we want to convey) in person rather than by telephone or email. The FAA, in other words, imposes burdens on our practice that are far heavier than the burdens imposed by the kinds of surveillance that the government has engaged in historically.

I declare under penalty of perjury under the laws of the United States and the State of New York that the foregoing is true and correct.

/s/ SCOTT McKAY
SCOTT MCKAY

Executed at New York City, New York on December 1, 2008.

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES DEFENDANTS

Filed: Dec. 15, 2008

DECLARATION OF
PROFESSOR STEPHEN GILLERS

I, Stephen Gillers, an attorney admitted to practice before this Court, and the Courts of the State of New York, hereby affirm under penalty of perjury as follows:

1. I am a chaired professor of law at New York University School of Law. I have been on the faculty since 1978 and was vice dean from 1999 to 2004. I have taught Regulation of Lawyers ("legal ethics") at NYU, and as a visitor elsewhere, since 1978 and am author of a leading casebook in the field, first published in 1985 and now in a seventh edition (published in 2005) with an eighth edition forthcoming in 2009. My field of study encompasses the ethical and legal rules governing the legal and judicial professions in the United States. I have written extensively on legal ethics in law journals and in the law and popular press. I have spoken on legal ethics at bar associations nationwide, law firms, law school conferences, corporate law offices, and judicial conferences. In New York, I have served on the ethics committee of the Association of the Bar and on the Departmental Disciplinary Committee of the First Department Appellate Division. I am a member (and former chair) of the American Bar Association's Policy Implementation Committee, whose charge is to assist American jurisdictions in adopting ethics rules for lawyers. A resume accurately reflecting my qualifications is annexed as Exhibit A.

2. I have been asked to speak to the professional responsibilities of lawyers in the positions of Sylvia Royce and Scott McKay. By "positions," I mean lawyers who have good reason to believe that their communications with clients, co-counsel, clients' family members and associates, witnesses, experts, and others abroad will be intercepted under the authority of the FISA

Amendments Act ("FAA") because those individuals' geographic location, their identity, or the nature of their communications make them likely targets of FAA surveillance. I am not offering an opinion on the constitutionality of the FAA. Nor am I addressing the legal question whether the lawyer plaintiffs have standing. My opinion is limited to the requirements of ethics rules for lawyers in the position of the plaintiff lawyers. I recognize, of course, that these requirements bear on the standing inquiry.

3. In order to offer my opinion, I have read and assume familiarity with the following: the Complaint, Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment, Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, the Declaration of Sylvia Royce and the Declaration of Scott McKay. I assume the truth of the assertions in the declarations of Ms. Royce and Mr. McKay. Any other factual assertions in this Declaration are those I have been asked to make. However, the inferences that I believe a lawyer should reasonably draw from those facts, and the ethical duties that follow from those inferences, constitute the substance of my opinion.

4. Ms. Royce and Mr. McKay practice in Washington, D.C. and Idaho respectively. Both jurisdictions have professional conduct rules for lawyers that are substantially the same as (though not identical to) the American Bar Association's Model Rules of Professional Conduct ("Model Rules"). Indeed, all but three U.S. states now have rules that derive substantially from the Model Rules. The three exceptions are New York, California, and Maine. New York's Code of Professional Responsibility derives from, though it is not identical to,

the 1970 ABA Code of Professional Responsibility. New York's Appellate Divisions now have before them State Bar proposals to conform the New York Code more closely to the language of the ABA Model Rules. California imposes confidentiality duties by statute. Cal. Bus. & Prof. Code 6068(e).

5. Despite jurisdictional differences, the duties I address here are common to lawyers in all American jurisdictions. For convenience, therefore, I will use the Model Rules (or "MR") as the basis for my opinion.

6. The duties under the Model Rules are: (a) a duty to protect confidential information gained in representing a client under MR 1.6; (b) a duty under MR 1.4 to keep a client informed about the status of his or her matter and to respond to inquiries; and (c) a duty of competence under MR 1.1, which includes a duty to conduct a factual investigation equal to that which a prudent lawyer exercising a reasonable degree of care, skill, and judgment, would conduct.

7. Each of these duties necessarily entails communication, whether with the client or with third persons in connection with client matters. Those communications will very often be confidential within the meaning of the Model Rules. MR 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

8. Confidential information under MR 1.6 is a broad category. It includes both privileged information (generally, information gained from the client or the client's agents) and other information gained in representing

the client from any source. *See* MR 1.6 cmt. [1] (confidential information is "information relating to the representation"); cmt [4] (duty of confidentiality applies "to all information relating to the representation whatever its source").

9. Central to my opinion with regard to MR 1.6 is the duty of a lawyer to safeguard confidential information. A lawyer may not divulge confidential information about a client over any vehicle of communication, including telephone, fax, and e-mail, if the lawyer does not have "a reasonable expectation of privacy" in the use of the vehicle. ABA Opinion 99-413 (finding such expectation for e-mail). Comments [16] and [17] to MR 1.6 are in accord and provide in full:

> **Acting Competently to Preserve Confidentiality**
>
> [16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.
>
> [17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the

> extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

10. If an attorney has reason to believe that sensitive and confidential information related to the representation of a client and transmitted by telephone, fax, or e-mail is reasonably likely to be intercepted by others, he or she may not use that means of communication in exchanging or collecting the information. He or she must find a safer mode of communication, if one is available, which may require communication in person.

11. The main legal issue in the parties' briefs is this: Given that the communications of United States persons located within the United States will be acquired under the FAA, even if these persons are not targets of the interception, do the FAA's purported safeguards—e.g., its limitation on who may be targeted, the role of the FISA Court, and the law's minimization requirements —satisfy one or another provision of the Constitution. The answer to that question is irrelevant to my opinion because the professional responsibilities of the lawyers do not depend on the legality of any effort to intercept their communications relating to representation of a client. Determinative of how the lawyer may proceed is, instead, whether the lawyer has good reason to believe that his or her communications are reasonably likely to be intercepted, even if the interception is lawful.

12. For example: A lawyer may have good reason to believe that the government may be lawfully wiretap-

ping the client's (or the client's associates') telephones or intercepting the client's (or associates') e-mail. The lawyer would then act unethically if he or she nevertheless exchanged sensitive information about the client's matter, with the client or others, on the telephone or via e-mail. The assumed legality of the interception would not relieve the lawyer of obligations, described in MR 1.6 and its comments, to protect the communications relating to the matter from disclosure. The lawyer would have to find another, safe way to communicate.

13. Ms. Royce and Mr. McKay do have good reasons to believe that their communications with their clients or third persons (in connection with their clients' matters) over the telephone or electronically will be intercepted. The government's argument that the lawyers' concerns are based on "speculation and conjecture" is wrong. Any analysis of the two lawyers' concerns must be grounded in consideration of the identity of the particular clients or others with whom the lawyers are communicating, their location, and the scope of the government's power to intercept. It is impossible to answer the question "does the FAA change the way U.S. lawyers must behave in representing clients abroad?" without asking: who are the clients, with whom are the lawyers communicating, and where are the people located?

14. I am asked to assume from their submissions to the Court that in representing their clients, Ms. Royce and Mr. McKay speak to persons abroad, in connection with client matters, who are likely to be targets of the government's authority under the FAA, because those persons are suspected of involvement in terrorism, are associated with suspected terrorists, or are in geographic areas where the U.S. government's counterterrorism

efforts are focused. Ms. Royce represents a prisoner in Guantanamo Bay, Mohammedou Ould Salahi, in connection with his habeas petition and in other matters. The government suspects Mr. Salahi of terrorist activities. Mr. McKay represents Khalid Sheik Mohammed, also a prisoner at Guantanamo, in connection with his detention and trial by military commission. He also currently represents Sami Omar Al-Hussayen, a Saudi national in civil litigation in the United States. Mr. Al-Hussayen was acquitted of terrorism charges following trial in 2004.

15. The lawyers' work for their clients requires them to communicate with their clients, co-counsel and others, to keep their clients informed of the status of the matters, and to conduct factual investigations in accordance with their duty of competent representation. Some of the persons with whom they must communicate in the course of representing their clients are abroad.

16. Because of the status of their clients, the identity and location of witnesses and sources, and the breadth of FAA authority, Ms. Royce and Mr. McKay have good reason to believe that the persons abroad with whom they must communicate to satisfy their professional obligations will be or are targets of the authority granted the government under the FAA. In order to intercept electronic communications with persons with whom Ms. Royce and Mr. McKay speak, the FAA does not require the government to have probable cause or even, in any filing with the FISC, state the individual identities of the targets of the interception. I am asked to assume that the FAA authorizes the government to conduct mass, non-individualized, acquisition of electronic communications. Under these circumstances, the lawyer

plaintiffs have an ethical obligation to limit their telephonic and electronic communications with persons abroad to routine and non-sensitive information.

17. The government asserts that Ms. Royce and Mr. McKay cannot show with certainty that any of their communications have been or will be intercepted. But their ethical obligations do not depend on any such proof. It is triggered by the *risk* that the communications will be intercepted. Or to put it another way, the duty is to *safeguard* confidential information. The ethical violation is complete if a lawyer does not take appropriate measures to safeguard confidential information proportionate to the risk of discovery, even if, as it happens, the lawyer's failure does not result in certain discovery.

18. It is also no answer to say that the lawyers are relieved of their duties so long as the seized information is not used (or can be suppressed from use) against their clients in court. The duty of confidentiality is broader than a duty to protect against adverse use of information in court. It is a duty to safeguard the information from discovery by others, regardless of the use to which it may or may not be put and regardless of whether the others do or do not reveal the information in other forums—assuming it is even possible ever to know whether or how the confidential information was used.

19. Consider an analogy. A lawyer in a Starbuck's coffee shop receives a call on her cell phone about a client matter. Nearby on her right is a woman seemingly engrossed in Proust. On her left is a man with his eyes closed, possibly dozing. Across is a woman scribbling in a notebook. The lawyer does not know that anyone in the shop will listen to her end of the conversation. The

government might call that possibility "speculation and conjecture." But if those words mean to suggest that the risk is one the lawyer can blithely ignore, the government is wrong under MR 1.6 and state equivalents. Those rules would require the lawyer to move to a secure line elsewhere before discussing sensitive information. The answer would be the same for e-mail communication that posed an equivalent risk of discovery.

20. Indeed, this hypothetical poses an even lower risk of interception of confidential communications than do the facts before the Court. It is not likely that anyone in the coffee shop is intent on overhearing the lawyer's end of the conversation. And if by chance someone did so out of curiosity or because proximity made it unavoidable, the one-sided contents are not likely to mean anything. By contrast, the lawyer plaintiffs' concern here is that an actual or potential party adverse to their client, the government, has the claimed statutory authority, the means, and the motive to intercept both sides of communications with clients, witnesses, sources, co-counsel, and others abroad, in connection with client matters.

21. It is true that even if the law required an individualized warrant based on probable cause, the lawyers would still have a duty under Rule 1.6 to determine whether telephonic or electronic communications with their clients or others was sufficiently safe. As stated above, their duty does not depend on the legality of the interception but its degree of likelihood. Obviously, then, assessment of risk is pivotal and the breadth of the FAA authority must factor into the risk analysis. Because of the law's broad interception authority, and in light of the identities of the clients, as well as the iden-

tity and location of witnesses and sources, the risk of interception is exponentially expanded over what it would be if the government were obligated to demonstrate probable cause and identify its individual targets, to the satisfaction of a neutral judicial officer, as a prelude to interception.

22. Nothing in the requirement for minimization procedures changes this analysis. That requirement does not prevent the government, in targeting individuals outside the United States, from learning the content of communications by Ms. Royce or Mr. McKay with their clients or third parties about their clients' matters. The statutory minimization requirements are heavily qualified. They must be "reasonably designed" to minimize, not eliminate, certain acquisitions but only "in light of the purpose and technique of the particular surveillance." The minimization requirement, furthermore, exists only in so far as it is "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. § 1801(h)(1). And notwithstanding this language, the government is authorized to retain information that is evidence of a crime "which has been . . . committed." §1801(h)(3). That is, information about a concluded act, perhaps the very act about which the client needs legal advice. A request for advice or representation about concluded conduct, and counsel's response, is of course a privileged communication.

23. The question for me here is whether the [*sic*] Ms. Royce and Mr. McKay have good reason to believe that their communications with their clients or third parties abroad in connection with client matters will be intercepted, thereby requiring them to avoid using electronic

means of communication, including the telephone and e-mail, to impart or receive sensitive information that is within MR 1.6. My opinion is that the lawyers have good reason for this belief because of the status of their clients, the identity and location of witnesses and sources, and the broad authority that the FAA grants the government. The lawyers' decision to avoid electronic means of communication is not discretionary. It is obligatory. This limitation on the attorneys' work severely restricts their ability to represent their clients effectively.

/s/ STEPHEN GILLERS
STEPHEN GILLERS, ESQ.

Dated: December 8, 2008

Exhibit A

[EXHIBIT A OMITTED]

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Dec. 15, 2008

DECLARATION OF STEVEN M. BELLOVIN

I, Steven M. Bellovin, declare:

1. I am a resident of Westfield, NJ, over the age of eighteen. I have personal knowledge of the facts stated in this declaration. I am a professor in the Computer Science department at Columbia University, and a member of the Science and Technology Advisory Committee of the Department of Homeland Security. From 1982 to 2004, I worked for AT&T Bell Laboratories and for AT&T Labs Research, and I was named an AT&T Fellow in 1998. I continue to maintain affiliation with AT&T.

2. I am an expert on the interplay between networks and security. I was elected to the National Academy of Engineering in 2001, and I have served on numerous National Research Council computer security committees. I also served on the Internet Engineering Task Force's Internet Architecture Board from 1996 to 2002, and as an Internet Engineering Task Force security director from 2002 to 2004. I am the co-chair of the 2008 Applied Cryptography and Network Security conference and the co-author of "Firewalls and Internet Security: Repelling the Wily Hacker" (Addison-Wesley Professional 2004), the first book on the subject, and have authored or co-authored numerous other books, papers, and articles for various scientific journals. In addition to my current position at Columbia, I have held teaching positions at the University of North Carolina at Chapel Hill and at the University of Pennsylvania. In 2007 I was awarded the National Computer Systems Security Award, presented by the National Institute of Standards and Technology and the National Security Agency. In 1995, I and two colleagues were awarded the Usenix Lifetime Achievement Award for developing

Usenet, a world-wide distributed Internet discussion system. I graduated with a B.A. from Columbia University, and received an M.S. and a Ph.D in computer science from the University of North Carolina at Chapel Hill.

SCOPE OF THIS DECLARATION

3. I have been asked to render my professional opinion concerning the physical infrastructure used to transmit international communications during the 1970s, in particular at the time that Congress was considering the enactment of the Foreign Intelligence Surveillance Act ("FISA"). The opinions I express in this declaration are based on the technical and other specialized knowledge I have obtained through my experience, training, research, teaching, and education described above. In addition, I specifically consulted the following sources, among others: Bell Telephone Laboratories, *Engineering and Operations in the Bell System* (2d ed. 1983); Peter K. Runge, *Undersea Lightwave Communications* (Patrick R. Trischitta ed., IEEE 1986); David S. Kris, *Modernizing the Foreign Intelligence Surveillance Act* (Brookings Institution, Georgetown University Law Center, and Hoover Institution, Working Paper, 2007); *In re American Telephone and Telegraph Co.*, 63 F.C.C. 2d 166 (1977); and American Telephone and Telegraph Company Annual Reports from 1975-1979. The opinions I express herein are my own and do not necessarily reflect the views of any institution or organization with which I am affiliated.

DEVELOPMENT OF THE NATION'S COMMUNICATIONS INFRASTRUCTURE

4. The first transatlantic telegraph cable was laid between Ireland and Newfoundland in 1858. Although this first transoceanic cable worked for only one month and could only carry a few words within that time span, it spurred additional experimentation. A stronger cable was laid over this route in 1866 and could transmit six to eight words per minute. Although early cables represented a breakthrough in communications technology, they were unreliable and their capacity was very limited. The development of coaxial cable radically altered cable communications, by providing a more stable, secure medium over which many signals could travel at the same time.

5. In the early 1930s the American Telephone and Telegraph Company ("AT&T") began to study the possibility of laying deep sea coaxial cable that could carry voice messages. Cable was meant to provide a more reliable alternative to short wave radio communications, which could vary depending on such things as sunspot activity. After many attempts, TAT-1, the first commercial transoceanic submarine cable, was put into service in 1956. It carried thirty-six telephone channels simultaneously between England and Newfoundland. In 1959, TAT-2, which was capable of carrying forty-eight telephone channels simultaneously, went into service, linking France and Newfoundland. Completion of TAT-3 (between England and New Jersey) in 1963 and TAT-4 (between France and New Jersey) in 1965 added an additional 138 telephone channels per cable and created a direct cable link between the United States and Europe. Advancement in telecommunications technology allowed

for a dramatic increase in capacity over the next decade with TAT-6 and TAT-7 each carrying 4,000 telephone channels directly between Europe and the United States.

6. In comparison to cable telecommunications, satellite telecommunications developed much later. Telstar, the first active communications satellite, was launched into orbit in 1962. It was capable of successfully transmitting faxes, high-speed data, live and taped television programming, and domestic and transatlantic telephone calls. The first commercial communications satellite, Intelsat 1, was launched in 1965 and provided telecommunications service between the United States and Europe. Intelsat 1 supplemented existing transatlantic cable links and carried 240 voice circuits. Later satellites provided increased capacity.

7. Despite the growing use of satellites for broadcasting and some communications during the 1970s, transoceanic cables remained a principal medium for the transmission of international communications. In fact, in the 1970s, transmission capacity was more-or-less evenly divided between satellite and transoceanic cable. This was in part by design. In the 1970s, the Federal Communications Commission ("FCC") implemented a policy known as "balanced loading," which required that the transmission of international telecommunications be divided equally between satellite and cable technology. As part of this policy, in 1977 the FCC authorized the activation of additional circuits on the TAT-6 transatlantic cable. (The transmission of military communications was also divided, by design, between the available technologies. In the late 1970s the Department of Defense maintained a policy of routing one third of its overseas

communications through commercial cable, one-third through commercial satellite, and one-third through military satellite.) In 1980, AT&T reported that its network supported "a complex web of 1.4 billion miles of microwave and cable paths and 12,000 satellite circuits" and was "linked to the rest of the world's telephones by undersea cable and satellite."

8. Thus in the mid 1970s, international communications were transmitted over both satellite and cable. Moreover, the expectation was that cable would continue to be a principal medium for the transmission of international communications for the foreseeable future. There were sound technical reasons for continued use of coaxial cable; both voice and data connections were inherently of higher quality when sent over cable compared to satellite. In fact, many calls were routed over an asymmetric path—satellite one way, coaxial cable the other—to maintain voice quality.

9. At the time Congress was debating the passage of FISA, Americans' international communications were being transmitted more-or-less equally over satellite and transoceanic cable. Moreover, telecommunications companies were expected to continue developing both cable and satellite capacity in the future. In fact, new transoceanic cables were sunk the year after FISA passed, and throughout the early 1980s. In enacting FISA, Congress regulated, among other things, "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States." 50 U.S.C. § 1801(f)(2). In regulating this kind of surveillance, Congress regu-

lated—and plainly intended to regulate—certain kinds of surveillance of Americans' international communications.

10. I understand that the government has argued that, in enacting FISA, "Congress did not generally intend the statute's regulatory framework to cover surveillance directed at persons outside the United States —even with respect to those persons' international communications with parties inside the United States." I believe that this is, at best, a gross oversimplification. In the 1970s, Americans' international communications were as likely to be transmitted via satellite as they were via transoceanic cable. Moreover, cable capacity was expected to grow significantly over the subsequent decades. The government's claim that FISA was not intended to regulate the surveillance of Americans' international communications is incorrect.

I declare under penalty of perjury under the laws of the United States and of the State of New Jersey that the foregoing is true and correct.

/s/ STEVEN M. BELLOVIN
STEVEN M. BELLOVIN

Executed at London, England on December 9, 2008.

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Sept. 12, 2008

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

---

1. In the fall of 2001, President Bush authorized the National Security Agency ("NSA") to launch a secret electronic surveillance program (the "Program").

   A. In December 2005 *The New York Times* reported that soon after the September 11 attacks President Bush had secretly authorized the NSA to intercept the international communications of Americans without first obtaining the court-approved warrants normally required for domestic surveillance. Jaffer Decl. ¶3 (Exh. A).

   B. President Bush acknowledged: "In the weeks following the terrorist attacks on our Nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaida and related terrorist organizations." Jaffer Decl. ¶4 (Exh. B).

2. President Bush reauthorized the Program repeatedly between 2001 and 2007. Jaffer Decl. ¶5 (Exh. C).

3. Under the Program, the NSA intercepted telephone and e-mail communications that originated or terminated inside the United States.

   A. Then-Attorney General Alberto Gonzales stated at a press conference: "The President has authorized a program to engage in electronic surveillance of a particular kind, and this would be the intercepts of contents of communications where one of the—one party to the communication is outside the United States." Jaffer Decl. ¶6 (Exh. D).

4. Under the Program, the NSA intercepted electronic communications without probable cause, and without obtaining a warrant or any other type of judicial authorization.

   A. Then-NSA Director General Michael Hayden stated that the NSA targeted for interception "calls . . . [the government has] a reasonable basis to believe involve al Qaeda or one of its affiliates." Jaffer Decl. ¶7 (Exh. E).

   B. General Hayden stated that decisions to monitor particular targets were made by NSA "shift supervisors." Jaffer Decl. ¶6 (Exh. D).

5. The FISC issued orders in January 2007 that authorized the Government to "target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization." Jaffer Decl. ¶8 (Exh. F).

6. The January 2007 FISC orders subjected any electronic surveillance that was occurring as part of the Program to the approval of the Foreign Intelligence Surveillance Court. Jaffer Decl. ¶ 9 (Exh. G).

7. A FISC judge modified the January 2007 orders in the spring of 2007, reportedly narrowing the authority that the FISC had extended to the executive branch in January. Jaffer Decl. ¶9 (Exh. G).

8. Following the FISC's modification of its January 2007 orders, Director of National Intelligence ("DNI") John M. McConnell appealed to Congress to amend FISA. Jaffer Decl. ¶10 (Exh. H).

9. Plaintiffs are harmed by the challenged law.

A. Plaintiffs are attorneys and human rights, labor, legal, and media organizations whose work requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, journalistic sources, witnesses, experts, foreign government officials, and victims of human rights abuses located outside the United States. Royce Decl. ¶¶2-6; Mariner Decl. ¶¶2, 5-9; Walsh Decl. ¶¶3, 5; Klein Decl. ¶¶2-4.

B. Some of the plaintiffs communicate by telephone and e-mail with people the U.S. government believes or believed to be associated with terrorist organizations. Royce Decl. ¶¶3-6; Mariner Decl. ¶8; Walsh Decl. ¶6.

C. Some of the plaintiffs communicate by telephone and e-mail with political and human rights activists who oppose governments that are supported economically or militarily by the U.S. government. Klein Decl. ¶¶6-7; Walsh Decl. ¶6.

D. Some of the plaintiffs communicate by telephone and e-mail with people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Mariner Decl. ¶8; Walsh Decl. ¶¶5, 8, 11.

E. All of the plaintiffs exchange information that constitutes "foreign intelligence information" within the meaning of the FAA. Royce Decl. ¶8; Mariner Decl. ¶8; Walsh Decl. ¶¶5-6, 8-9, 11; Klein Decl. ¶¶5-6.

F. Because of the nature of their communications and the identities and geographic location of the

individuals with whom they communicate, plaintiffs reasonably believe that their communications will be acquired, retained, analyzed, and disseminated under the challenged law. Royce Decl. ¶5; Mariner Decl. ¶8; Walsh Decl. ¶¶4-6, 8, 11; Klein Decl. ¶¶5-6.

G. The FAA disrupts Plaintiffs' ability to engage in confidential communications—communications that are integral to their professional activities. Royce Decl. ¶¶7-9; Mariner Decl. ¶¶9-11; Walsh Decl. ¶¶7, 9-13; Klein Decl. ¶¶7-9.

H. The FAA compromises plaintiffs' ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and to engage in other legitimate and constitutionally protected communications. Royce Decl. ¶¶6, 9; Mariner Decl. ¶10; Walsh Decl. ¶¶9-13; Klein Decl. ¶¶8-9.

I. Plaintiffs have ceased engaging in certain conversations on the telephone and by e-mail. Royce Decl. ¶¶7-8.

J. The FAA forces plaintiffs to take costly and burdensome measures to protect the confidentiality of sensitive and privileged communications. Mariner Decl. ¶10; Klein Decl. ¶9; Royce Decl. ¶7.

K. Because the FAA inhibits their ability to communicate by telephone and e-mail with sources, clients, and others essential to their work, some plaintiffs must now travel long distances to meet personally with individuals. Mariner Decl. ¶10; Klein Decl. ¶9; Royce Decl. ¶7.

L. The threat of surveillance under the new law has a much greater impact on plaintiffs' work than previous U.S. government surveillance. Walsh Decl. ¶11; Mariner Decl. ¶11.

Respectfully submitted,

/s/ JAMEEL JAFFER
JAMEEL JAFFER (JJ-4653)
MELISSA GOODMAN (MG-7844)
L. DANIELLE TULLY (DT-0509)

American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

CHRISTOPHER DUNN (CD-3991)
ARTHUR EISENBERG (AE-2012)

New York Civil Liberties Union
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300

CHARLES S. SIMS
THEODORE K. CHENG
MATTHEW J. MORRIS

Proskauer Rose LLP
1585 Broadway
New York, NY 10036
212-969-3000

Attorneys for Plaintiffs

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Oct. 28, 2008

DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

In response to Plaintiffs' Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment, Defendants admit, deny, or otherwise aver as follows:

1. Deny the first sentence of this paragraph, except to admit that in December 2005, the President stated that, after the attacks of September 11, 2001, he authorized the National Security Agency ("NSA") to intercept certain "one-end" international communications to or from the United States where a communicant to the call was reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist organization—later referred to as the "Terrorist Surveillance Program" ("TSP"). In addition, the statement in this paragraph presents no genuine issue of material fact relevant to the pending motions for summary judgment concerning the challenged FISA Act Amendments of 2008.

1A. The averment in ¶ 1A refers to the content of a newspaper article. Defendants admit that the article at Exh. A to the Jaffer Declaration was published by the New York Times on December 16, 2005. The statements in the article are hearsay inadmissible for the truth of the matter asserted on summary judgment. In addition, the statement in this paragraph presents no genuine issue of material fact relevant to the pending motions for summary judgment concerning the challenged FISA Act Amendments of 2008.

1B. Admit that the statement quoted in ¶ 1B was made by the President on December 17, 2005. The Court is referred to the full statement at Exh. B to the Jaffer Declaration for a full and complete statement of its content.

2. The averment in ¶ 2 refers to a statement made by the President on December 19, 2005 at Exh. C to the Jaffer Declaration, to which the Court is referred for a full and complete statement of its content. In that statement, the President stated in part: "[C]onsistent with U.S. law and the Constitution, I authorized the interception of international communications of people with known links to Al Qaida and related terrorist organizations. The program is carefully reviewed every 45 days to ensure it is being used properly" and was "reauthorized more than 30 times since the September 11th attacks. Admit also that the President decided to discontinue the TSP in January 2007. In addition, the statement in this paragraph presents no genuine issue of material fact relevant to the pending motions for summary judgment concerning the challenged FISA Act Amendments of 2008.

3. *See* response to ¶ 1.

3A. Admit that the statement quoted in ¶ 3A was made by the Attorney General on December 19, 2005. The quoted sentence is contained in the full statement at Exh. D to the Jaffer Declaration at page 1 of 12, to which the Court is referred for a full and complete statement of its content.

4. Deny, except to admit that interception of international communications under the TSP after the 9/11 was authorized by the President, and otherwise aver that the averment in this paragraph presents no genuine issue of material fact relevant to the pending motions for summary judgment concerning the challenged FISA Act Amendments of 2008.

4A. Deny, except to admit that ¶ 4A refers to a statement by the Deputy Director of National Intelligence at Exh. E to the Jaffer Declaration, to which the Court is referred for a full and complete statement of its content. In addition, the statement in this paragraph presents no genuine issue of material fact relevant to the pending motions for summary judgment concerning the challenged FISA Act Amendments of 2008.

4B. Deny, except to admit that ¶ 4A refers to a statement by the Deputy Director of National Intelligence Exh. E to the Jaffer Declaration, to which the Court is referred for a full and complete statement of its content. In addition, the statement in this paragraph presents no genuine issue of material fact relevant to the pending motions for summary judgment concerning the challenged FISA Act Amendments of 2008.

5. Admit. The Court is referred to Exhibit F to the Jaffer Declaration for a full and complete statement of its contents. In addition, the statement in this paragraph presents no genuine issue of material fact relevant to the pending motions for summary judgment concerning the challenged FISA Act Amendments of 2008.

6. Admit that the January 2007 FISC orders subjected any electronic surveillance that was occurring as part of the Terrorist Surveillance Program to the approval of the Foreign Intelligence Surveillance Court. *See* Exhibit F to the Jaffer Declaration. In addition, the statement in this paragraph presents no genuine issue of material fact relevant to the pending motions for summary judgment concerning the challenged FISA Act Amendments of 2008.

7. Deny, except to admit that ¶ 7 refers to statements by the Director of National Intelligence set forth in Exhibit G to the Jaffer Declaration, to which the Court is referred for a full and complete statement of their content. In addition, the statement in this paragraph presents no genuine issue of material fact relevant to the pending motions for summary judgment concerning the challenged FISA Act Amendments of 2008.

8. Deny, except to admit that ¶ 8 refers to statements by the Director of National Intelligence set forth in Exhibit H to the Jaffer Declaration, to which the Court is referred for a full and complete statement of their content.

9. Deny that plaintiffs have established that they are harmed by the challenged Act for purposes of establishing standing in this case.

9A. Defendants lack knowledge or information sufficient to admit or deny the averments in this paragraph, except to admit that they are contained in the cited declarations.

9B. Defendants lack knowledge or information sufficient to admit or deny the averments in this paragraph, except to admit that they are contained in the cited declarations.

9C. Defendants lack knowledge or information sufficient to admit or deny the averments in this paragraph, except to admit that they are contained in the cited declarations.

9D. Defendants lack knowledge or information sufficient to admit or deny the averments in this paragraph,

except to admit that they are contained in the cited declarations.

9E. Defendants lack knowledge or information sufficient to admit or deny the averments in this paragraph, except to admit that they are contained in the cited declarations.

9F. Defendants lack knowledge or information sufficient to admit or deny the averments in this paragraph, except to admit that they are contained in the cited declarations.

9G. Defendants lack knowledge or information sufficient to admit or deny the averments contained in the declarations cited in this paragraph, and, assuming *arguendo* that the asserted facts are true, otherwise deny that plaintiffs have established that they are harmed by the challenged Act for purposes of establishing standing in this case.

9H. Defendants lack knowledge or information sufficient to admit or deny the averments contained in the declarations cited in this paragraph, and, assuming *arguendo* that the asserted facts are true, otherwise deny that plaintiffs have established that they are harmed by the challenged Act for purposes of establishing standing in this case.

9I. Defendants lack knowledge or information sufficient to admit or deny the averments in this paragraph, except to admit that they are contained in the cited declarations.

9J. Defendants lack knowledge or information sufficient to admit or deny the averments contained in the declarations cited in this paragraph, and, assuming

arguendo that the asserted facts are true, otherwise deny that plaintiffs have established that they are harmed by the challenged Act for purposes of establishing standing in this case.

9K. Defendants lack knowledge or information sufficient to admit or deny the averments contained in the declarations cited in this paragraph, and, assuming *arguendo* that the asserted facts are true, otherwise deny that plaintiffs have established that they are harmed by the challenged Act for purposes of establishing standing in this case.

9L. Defendants lack knowledge or information sufficient to admit or deny the averments contained in the declarations cited in this paragraph, and, assuming *arguendo* that the asserted facts are true, otherwise deny that plaintiffs have established that they are harmed by the challenged Act for purposes of establishing standing in this case.

Dated: New York, New York
October 28, 2008

By: GREGORY G. KATSAS
Assistant Attorney General
CARL J. NICHOLS
Principal Deputy Associate Attorney General
Civil Division United States
Department of Justice

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York

By: /s/ ANTHONY J. COPPOLINO
ANTHONY J. COPPOLINO
Special Litigation Counsel
Civil Division, Federal Programs Branch
United States Department of Justice
20 Massachusetts Avenue, Room 6102
Washington, D.C. 20530
Tel No. (202) 514-4782
Fax No. (202) 616-8460
tony.coppolino@usdoj.gov

/s/ SERRIN TURNER
SERRIN TURNER
Assistant United States Attorney
86 Chambers Street
New York, New York 10007
Tel. No. (212) 637-2701
Fax No. (212) 637-2686
serrin.turner@usdoj.gov

Attorneys for Defendants

PAUL FREEBORNE
Trial Attorney
U.S. Department of Justice

APPENDIX P

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 08 Civ. 6259 (JGK)
ECF CASE

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; AND SYLVIA ROYCE, PLAINTIFFS

v.

JOHN M. MCCONNELL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; LT. GEN. KEITH B. ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY AND CHIEF OF THE CENTRAL SECURITY SERVICE; AND MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

Filed: Dec. 12, 2008

PLAINTIFFS' SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS

Plaintiffs file this Supplemental Statement of Undisputed Facts to support their Motion for Summary Judgment. The Supplemental Statement, which plaintiffs file in accordance with Local Rule 56.1(a), describes facts asserted in the affidavits of Steven M. Bellovin, Stephen Gillers, Christopher L. Hedges, and Scott McKay, all of which plaintiffs have filed herewith. Since the government has cross-moved for summary judgment, plaintiffs would ordinarily have a separate obligation to file a statement responding to the government's statement of undisputed facts. Local Rule 56.1(b). Here, however, the government has failed to file a Local Rule 56.1(a) statement to which plaintiffs can respond. This failure is "sufficient grounds to dismiss the motion." *Howard v. City of New York*, 302 F. Supp. 2d 256, 259 (S.D.N.Y. 2004) (Koeltl, J.). Finally, while the government *has* filed a statement under Local Rule 56.1(b), the statement is deficient because it relies only on unsupported denials of plaintiffs' Rule 56.1(a) statement but does not provide citations to admissible evidence, as required by the rule. Accordingly, all facts asserted in plaintiffs' 56.1(a) submission must be deemed admitted to the extent they are supported by factual proffers in the record. *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003).

1. In the 1970s, Americans' international communications were transmitted essentially evenly between satellite and transoceanic cable. Bellovin Decl. ¶¶ 7-9.

2. Plaintiffs are harmed by the challenged law.

   A. Plaintiffs' work requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients,

journalistic sources, witnesses, experts, foreign government officials, and victims of human rights abuses located outside the United States. Hedges Decl. ¶ 4; McKay Decl. ¶¶ 5, 7, 9, 11-12; Gillers Decl. ¶ 15.

B. Some of the plaintiffs communicate by telephone and e-mail with people the U.S. government believes or believed to be associated with terrorist organizations. McKay Decl. ¶¶ 3, 5-7, 11-12.

C. Some of the plaintiffs communicate by telephone and e-mail with people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Hedges Decl. ¶¶ 4, 7; McKay Decl. ¶¶ 5, 12.

D. Plaintiffs exchange information that constitutes "foreign intelligence information" within the meaning of the FAA. Hedges Decl. ¶ 7; McKay Decl. ¶¶ 5, 7, 12.

E. Because of the nature of their communications and the identities and geographic location of the individuals with whom they communicate, plaintiffs reasonably believe that their communications will be acquired, retained, analyzed, and disseminated under the challenged law. Hedges Decl. ¶¶ 6-7; McKay Decl ¶¶ 4, 6; Gillers Decl. ¶¶ 13, 16, 23.

F. The FAA compromises plaintiffs' ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and engage in other legitimate and constitutionally protected communications. Hedges

Decl. ¶¶ 8-9; McKay Decl. ¶¶ 10-11, 13-14; Gillers Decl. ¶¶ 10, 12, 23.

G. Plaintiffs have ceased engaging in certain conversations on the telephone and by e-mail. Hedges Decl. ¶¶ 8-9; McKay Decl. ¶¶ 8, 10.

H. The FAA forces plaintiffs to take costly and burdensome measures to protect the confidentiality of sensitive and privileged communications. Hedges Decl. ¶¶ 8-9; McKay Decl. ¶¶ 8, 10-11, 14.

I. Because the FAA inhibits their ability to communicate by telephone and e-mail with sources, clients, and others essential to their work, some plaintiffs must now travel long distances to meet personally with individuals. Hedges Decl. ¶ 9; McKay Decl. ¶ 10.

J. Plaintiff attorneys have an ethical obligation to avoid communicating confidential information about client matters over telephone, fax, or e-mail if they have reason to believe that it is likely to be intercepted by others. McKay Decl. ¶¶ 8-11, 14; Gillers Decl. ¶¶ 10-23.

K. The threat of surveillance under the new law has a much greater impact on plaintiffs' work than other kinds of U.S. government surveillance. Hedges Decl. ¶ 6; McKay Decl. ¶¶ 13-14; Gillers Decl. ¶ 21.

Respectfully submitted,

/s/ JAMEEL JAFFER
JAMEEL JAFFER
MELISSA GOODMAN
L. DANIELLE TULLY

LAURENCE M. SCHWARTZTOL
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2583
jjaffer@aclu.org

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION, by
CHRISTOPHER DUNN
ARTHUR EISENBERG
New York Civil Liberties Union
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300

CHARLES S. SIMS
THEODORE K. CHENG
MATTHEW J. MORRIS
Proskauer Rose LLP
1585 Broadway
New York, NY 10036
212-969-3000

December 12, 2008

APPENDIX Q

1. 50 U.S.C. 1801 (2006 & Supp. II 2008) provides:

Definitions

As used in this subchapter:

(a) "Foreign power" means—

(1) a foreign government or any component thereof, whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons;

(6) an entity that is directed and controlled by a foreign government or governments; or

(7) an entity not substantially composed of United States persons that is engaged in the international proliferation of weapons of mass destruction.

(b) "Agent of a foreign power" means—

(1) any person other than a United States person, who—

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities;

(C) engages in international terrorism or activities in preparation therefore;

(D) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor; or

(E) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor for or on behalf of a foreign power; or

(2) any person who—

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly

engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

(c) "International terrorism" means activities that—

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended—

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) "Sabotage" means activities that involve a violation of chapter 105 of title 18, or that would involve such a violation if committed against the United States.

(e) "Foreign intelligence information" means—

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

(f) "Electronic surveillance" means—

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of title 18;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

(g) "Attorney General" means the Attorney General of the United States (or Acting Attorney General), the Deputy Attorney General, or, upon the designation of the Attorney General, the Assistant Attorney General designated as the Assistant Attorney General for National Security under section 507A of title 28.

(h) "Minimization procedures", with respect to electronic surveillance, means—

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

(i) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

(j) "United States", when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

(k) "Aggrieved person" means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

(*l*) "Wire communication" means any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as

a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

(m) "Person" means any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.

(n) "Contents", when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

(*o*) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(p) "Weapon of mass destruction" means—

(1) any explosive, incendiary, or poison gas device that is designed, intended, or has the capability to cause a mass casualty incident;

(2) any weapon that is designed, intended, or has the capability to cause death or serious bodily injury to a significant number of persons through the release, dissemination, or impact of toxic or poisonous chemicals or their precursors;

(3) any weapon involving a biological agent, toxin, or vector (as such terms are defined in section 178 of title 18) that is designed, intended, or has the capability to cause death, illness, or serious bodily injury to a significant number of persons; or

(4) any weapon that is designed, intended, or has the capability to release radiation or radioactivity causing death, illness, or serious bodily injury to a significant number of persons.

2. 50 U.S.C. 1804 (Supp. II 2008) provides:

Applications for court orders

(a) Submission by Federal officer; approval of Attorney General; contents

Each application for an order approving electronic surveillance under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 1803 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include—

(1) the identity of the Federal officer making the application;

(2) the identity, if known, or a description of the specific target of the electronic surveillance;

(3) a statement of the facts and circumstances relied upon by the applicant to justify his belief that—

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(4) a statement of the proposed minimization procedures;

(5) a description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(6) a certification or certifications by the Assistant to the President for National Security Affairs, an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate, or the Deputy Director of the Federal Bureau of Investigation, if designated by the President as a certifying official—

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that a significant purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 1801(e) of this title; and

(E) including a statement of the basis for the certification that—

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably be obtained by normal investigative techniques;

(7) a summary statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(8) a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application; and

(9) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this subchapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter.

(b) Additional affidavits or certifications

The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(c) Additional information

The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 1805 of this title.

(d) Personal review by Attorney General

(1)(A) Upon written request of the Director of the Federal Bureau of Investigation, the Secretary of Defense, the Secretary of State, the Director of National Intelligence, or the Director of the Central Intelligence

Agency, the Attorney General shall personally review under subsection (a) of this section an application under that subsection for a target described in section 1801(b)(2) of this title.

(B) Except when disabled or otherwise unavailable to make a request referred to in subparagraph (A), an official referred to in that subparagraph may not delegate the authority to make a request referred to in that subparagraph.

(C) Each official referred to in subparagraph (A) with authority to make a request under that subparagraph shall take appropriate actions in advance to ensure that delegation of such authority is clearly established in the event such official is disabled or otherwise unavailable to make such request.

(2)(A) If as a result of a request under paragraph (1) the Attorney General determines not to approve an application under the second sentence of subsection (a) of this section for purposes of making the application under this section, the Attorney General shall provide written notice of the determination to the official making the request for the review of the application under that paragraph. Except when disabled or otherwise unavailable to make a determination under the preceding sentence, the Attorney General may not delegate the responsibility to make a determination under that sentence. The Attorney General shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event the Attorney General is disabled or otherwise unavailable to make such determination.

(B) Notice with respect to an application under subparagraph (A) shall set forth the modifications, if any, of

the application that are necessary in order for the Attorney General to approve the application under the second sentence of subsection (a) of this section for purposes of making the application under this section.

(C) Upon review of any modifications of an application set forth under subparagraph (B), the official notified of the modifications under this paragraph shall modify the application if such official determines that such modification is warranted. Such official shall supervise the making of any modification under this subparagraph. Except when disabled or otherwise unavailable to supervise the making of any modification under the preceding sentence, such official may not delegate the responsibility to supervise the making of any modification under that preceding sentence. Each such official shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event such official is disabled or otherwise unavailable to supervise the making of such modification.

3. 50 U.S.C. 1805 (2006 & Supp. II 2008) provides in pertinent part:

Issuance of order

(a) Necessary findings

Upon an application made pursuant to section 1804 of this title, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that—

(1) the application has been made by a Federal officer and approved by the Attorney General;

(2) on the basis of the facts submitted by the applicant there is probable cause to believe that—

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power: *Provided*, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(3) the proposed minimization procedures meet the definition of minimization procedures under section 1801(h) of this title; and

(4) the application which has been filed contains all statements and certifications required by section 1804 of this title and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 1804(a)(7)(E) 1 of this title and any other information furnished under section 1804(d) 1 of this title.

(b) Determination of probable cause

In determining whether or not probable cause exists for purposes of an order under subsection (a)(2) of this section, a judge may consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target.

(c) Specifications and directions of orders

(1) Specifications

An order approving an electronic surveillance under this section shall specify—

(A) the identity, if known, or a description of the specific target of the electronic surveillance identified or described in the application pursuant to section 1804(a)(3) of this title;

(B) the nature and location of each of the facilities or places at which the electronic surveillance will be directed, if known;

(C) the type of information sought to be acquired and the type of communications or activities to be subjected to the surveillance;

(D) the means by which the electronic surveillance will be effected and whether physical entry will be used to effect the surveillance; and

(E) the period of time during which the electronic surveillance is approved.

(2) Directions

An order approving an electronic surveillance under this section shall direct—

(A) that the minimization procedures be followed;

(B) that, upon the request of the applicant, a specified communication or other common carrier, landlord, custodian, or other specified person, or in circumstances where the Court finds, based upon specific facts provided in the application, that the

actions of the target of the application may have the effect of thwarting the identification of a specified person, such other persons, furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier, landlord, custodian, or other person is providing that target of electronic surveillance;

(C) that such carrier, landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished that such person wishes to retain; and

(D) that the applicant compensate, at the prevailing rate, such carrier, landlord, custodian, or other person for furnishing such aid.

(3) Special directions for certain orders

An order approving an electronic surveillance under this section in circumstances where the nature and location of each of the facilities or places at which the surveillance will be directed is unknown shall direct the applicant to provide notice to the court within ten days after the date on which surveillance begins to be directed at any new facility or place, unless the court finds good cause to justify a longer period of up to 60 days, of—

(A) the nature and location of each new facility or place at which the electronic surveillance is directed;

(B) the facts and circumstances relied upon by the applicant to justify the applicant's belief that each new facility or place at which the electronic surveillance is directed is or was being used, or is about to be used, by the target of the surveillance;

(C) a statement of any proposed minimization procedures that differ from those contained in the original application or order, that may be necessitated by a change in the facility or place at which the electronic surveillance is directed; and

(D) the total number of electronic surveillances that have been or are being conducted under the authority of the order.

(d) Duration of order; extensions; review of circumstances under which information was acquired, retained or disseminated

(1) An order issued under this section may approve an electronic surveillance for the period necessary to achieve its purpose, or for ninety days, whichever is less, except that (A) an order under this section shall approve an electronic surveillance targeted against a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title, for the period specified in the application or for one year, whichever is less, and (B) an order under this chapter for a surveillance targeted against an agent of a foreign power who is not a United States person may be for the period specified in the application or for 120 days, whichever is less.

(2) Extensions of an order issued under this subchapter may be granted on the same basis as an original order upon an application for an extension and new find-

ings made in the same manner as required for an original order, except that (A) an extension of an order under this chapter for a surveillance targeted against a foreign power, as defined in paragraph (5), (6), or (7) of section 1801(a) of this title, or against a foreign power as defined in section 1801(a)(4) of this title that is not a United States person, may be for a period not to exceed one year if the judge finds probable cause to believe that no communication of any individual United States person will be acquired during the period, and (B) an extension of an order under this chapter for a surveillance targeted against an agent of a foreign power who is not a United States person may be for a period not to exceed 1 year.

(3) At or before the end of the period of time for which electronic surveillance is approved by an order or an extension, the judge may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.

(e) Emergency orders

(1) Notwithstanding any other provision of this subchapter, the Attorney General may authorize the emergency employment of electronic surveillance if the Attorney General—

(A) reasonably determines that an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained;

(B) reasonably determines that the factual basis for the issuance of an order under this subchapter to approve such electronic surveillance exists;

(C) informs, either personally or through a designee, a judge having jurisdiction under section 1803 of this title at the time of such authorization that the decision has been made to employ emergency electronic surveillance; and

(D) makes an application in accordance with this subchapter to a judge having jurisdiction under section 1803 of this title as soon as practicable, but not later than 7 days after the Attorney General authorizes such surveillance.

(2) If the Attorney General authorizes the emergency employment of electronic surveillance under paragraph (1), the Attorney General shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed.

(3) In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 7 days from the time of authorization by the Attorney General, whichever is earliest.

(4) A denial of the application made under this subsection may be reviewed as provided in section 1803 of this title.

(5) In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived

from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

(6) The Attorney General shall assess compliance with the requirements of paragraph (5).

* * * *

4. 50 U.S.C. 1806 (2006 & Supp. II 2008) provides:

Use of information

(a) Compliance with minimization procedures; privileged communications; lawful purposes

Information acquired from an electronic surveillance conducted pursuant to this subchapter concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this subchapter. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character. No information acquired from an electronic surveillance pursuant to

this subchapter may be used or disclosed by Federal officers or employees except for lawful purposes.

(b) Statement for disclosure

No information acquired pursuant to this subchapter shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

(c) Notification by United States

Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

(d) Notification by States or political subdivisions

Whenever any State or political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision thereof, against an aggrieved person any information obtained

or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the State or political subdivision thereof shall notify the aggrieved person, the court or other authority in which the information is to be disclosed or used, and the Attorney General that the State or political subdivision thereof intends to so disclose or so use such information.

(e) Motion to suppress

Any person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that—

(1) the information was unlawfully acquired; or

(2) the surveillance was not made in conformity with an order of authorization or approval.

Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(f) In camera and ex parte review by district court

Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of

the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

(g) Suppression of evidence; denial of motion

If the United States district court pursuant to subsection (f) of this section determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the

aggrieved person except to the extent that due process requires discovery or disclosure.

(h) Finality of orders

Orders granting motions or requests under subsection (g) of this section, decisions under this section that electronic surveillance was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of applications, orders, or other materials relating to a surveillance shall be final orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.

(i) Destruction of unintentionally acquired information

In circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person.

(j) Notification of emergency employment of electronic surveillance; contents; postponement, suspension or elimination

If an emergency employment of electronic surveillance is authorized under section 1805(e) of this title and a subsequent order approving the surveillance is not obtained, the judge shall cause to be served on any United States

person named in the application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice of—

(1) the fact of the application;

(2) the period of the surveillance; and

(3) the fact that during the period information was or was not obtained. On an ex parte showing of good cause to the judge the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

(k) Coordination with law enforcement on national security matters

(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this subchapter may consult with Federal law enforcement officers or law enforcement personnel of a State or political subdivision of a State (including the chief executive officer of that State or political subdivision who has the authority to appoint or direct the chief law enforcement officer of that State or political subdivision) to coordinate efforts to investigate or protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

(2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 1804(a)(7)(B) of this title or the entry of an order under section 1805 of this title.

5. 50 U.S.C. 1809 (2006 & Supp. II 2008) provides in pertinent part:

Criminal sanctions

(a) Prohibited activities

A person is guilty of an offense if he intentionally—

(1) engages in electronic surveillance under color of law except as authorized by this chapter, chapter 119, 121, or 206 of title 18, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title;

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by this chapter, chapter 119, 121, or 206 of title 18, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title.

* * * *

6. 50 U.S.C. 1881 (Supp. II 2008) provides:

Definitions

(a) In general

The terms "agent of a foreign power", "Attorney General", "contents", "electronic surveillance", "foreign intelligence information", "foreign power", "person", "United States", and "United States person" have the meanings given such terms in section 1801 of this title, except as specifically provided in this subchapter.

(b) Additional definitions

(1) Congressional intelligence committees

The term "congressional intelligence committees" means—

(A) the Select Committee on Intelligence of the Senate; and

(B) the Permanent Select Committee on Intelligence of the House of Representatives.

(2) Foreign Intelligence Surveillance Court; Court

The terms "Foreign Intelligence Surveillance Court" and "Court" mean the court established under section 1803(a) of this title.

(3) Foreign Intelligence Surveillance Court of Review; Court of Review

The terms "Foreign Intelligence Surveillance Court of Review" and "Court of Review" mean the court established under section 1803(b) of this title.

(4) Electronic communication service provider

The term "electronic communication service provider" means—

(A) a telecommunications carrier, as that term is defined in section 153 of title 47;

(B) a provider of electronic communication service, as that term is defined in section 2510 of title 18;

(C) a provider of a remote computing service, as that term is defined in section 2711 of title 18;

(D) any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored; or

(E) an officer, employee, or agent of an entity described in subparagraph (A), (B), (C), or (D).

(5) Intelligence community

The term "intelligence community" has the meaning given the term in section 401a(4) of this title.

7. 50 U.S.C. 1881a (Supp. II 2008) provides:

Procedures for targeting certain persons outside the United States other than United States persons

(a) Authorization

Notwithstanding any other provision of law, upon the issuance of an order in accordance with subsection (i)(3) or a determination under subsection (c)(2), the Attorney General and the Director of National Intelligence may

authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.

(b) Limitations

An acquisition authorized under subsection (a)—

(1) may not intentionally target any person known at the time of acquisition to be located in the United States;

(2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;

(3) may not intentionally target a United States person reasonably believed to be located outside the United States;

(4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and

(5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

(c) Conduct of acquisition

(1) In general

An acquisition authorized under subsection (a) shall be conducted only in accordance with—

(A) the targeting and minimization procedures adopted in accordance with subsections (d) and (e); and

(B) upon submission of a certification in accordance with subsection (g), such certification.

(2) Determination

A determination under this paragraph and for purposes of subsection (a) is a determination by the Attorney General and the Director of National Intelligence that exigent circumstances exist because, without immediate implementation of an authorization under subsection (a), intelligence important to the national security of the United States may be lost or not timely acquired and time does not permit the issuance of an order pursuant to subsection (i)(3) prior to the implementation of such authorization.

(3) Timing of determination

The Attorney General and the Director of National Intelligence may make the determination under paragraph (2)—

(A) before the submission of a certification in accordance with subsection (g); or

(B) by amending a certification pursuant to subsection (i)(1)(C) at any time during which judicial review under subsection (i) of such certification is pending.

(4) Construction

Nothing in subchapter I shall be construed to require an application for a court order under such subchapter

for an acquisition that is targeted in accordance with this section at a person reasonably believed to be located outside the United States.

(d) Targeting procedures

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt targeting procedures that are reasonably designed to—

(A) ensure that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(B) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.

(2) Judicial review

The procedures adopted in accordance with paragraph (1) shall be subject to judicial review pursuant to subsection (i).

(e) Minimization procedures

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt minimization procedures that meet the definition of minimization procedures under section 1801(h) of this title or section 1821(4) of this title, as appropriate, for acquisitions authorized under subsection (a).

(2) Judicial review

The minimization procedures adopted in accordance with paragraph (1) shall be subject to judicial review pursuant to subsection (i).

(f) Guidelines for compliance with limitations

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt guidelines to ensure—

(A) compliance with the limitations in subsection (b); and

(B) that an application for a court order is filed as required by this chapter.

(2) Submission of guidelines

The Attorney General shall provide the guidelines adopted in accordance with paragraph (1) to—

(A) the congressional intelligence committees;

(B) the Committees on the Judiciary of the Senate and the House of Representatives; and

(C) the Foreign Intelligence Surveillance Court.

(g) Certification

(1) In general

(A) Requirement

Subject to subparagraph (B), prior to the implementation of an authorization under subsection (a), the Attorney General and the Director of National

Intelligence shall provide to the Foreign Intelligence Surveillance Court a written certification and any supporting affidavit, under oath and under seal, in accordance with this subsection.

(B) Exception

If the Attorney General and the Director of National Intelligence make a determination under subsection (c)(2) and time does not permit the submission of a certification under this subsection prior to the implementation of an authorization under subsection (a), the Attorney General and the Director of National Intelligence shall submit to the Court a certification for such authorization as soon as practicable but in no event later than 7 days after such determination is made.

(2) Requirements

A certification made under this subsection shall—

(A) attest that—

(i) there are procedures in place that have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court that are reasonably designed to—

(I) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(II) prevent the intentional acquisition of any communication as to which the sender and all

intended recipients are known at the time of the acquisition to be located in the United States;

(ii) the minimization procedures to be used with respect to such acquisition—

(I) meet the definition of minimization procedures under section 1801(h) or 1821(4) of this title, as appropriate; and

(II) have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court;

(iii) guidelines have been adopted in accordance with subsection (f) to ensure compliance with the limitations in subsection (b) and to ensure that an application for a court order is filed as required by this chapter;

(iv) the procedures and guidelines referred to in clauses (i), (ii), and (iii) are consistent with the requirements of the fourth amendment to the Constitution of the United States;

(v) a significant purpose of the acquisition is to obtain foreign intelligence information;

(vi) the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider; and

(vii) the acquisition complies with the limitations in subsection (b);

(B) include the procedures adopted in accordance with subsections (d) and (e);

(C) be supported, as appropriate, by the affidavit of any appropriate official in the area of national security who is—

(i) appointed by the President, by and with the advice and consent of the Senate; or

(ii) the head of an element of the intelligence community;

(D) include—

(i) an effective date for the authorization that is at least 30 days after the submission of the written certification to the court; or

(ii) if the acquisition has begun or the effective date is less than 30 days after the submission of the written certification to the court, the date the acquisition began or the effective date for the acquisition; and

(E) if the Attorney General and the Director of National Intelligence make a determination under subsection (c)(2), include a statement that such determination has been made.

(3) Change in effective date

The Attorney General and the Director of National Intelligence may advance or delay the effective date referred to in paragraph (2)(D) by submitting an amended certification in accordance with subsection (i)(1)(C) to the Foreign Intelligence Surveillance Court for review pursuant to subsection (i).

(4) Limitation

A certification made under this subsection is not required to identify the specific facilities, places, premises, or property at which an acquisition authorized under subsection (a) will be directed or conducted.

(5) Maintenance of certification

The Attorney General or a designee of the Attorney General shall maintain a copy of a certification made under this subsection.

(6) Review

A certification submitted in accordance with this subsection shall be subject to judicial review pursuant to subsection (i).

(h) Directives and judicial review of directives

(1) Authority

With respect to an acquisition authorized under subsection (a), the Attorney General and the Director of National Intelligence may direct, in writing, an electronic communication service provider to—

(A) immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services that such electronic communication service provider is providing to the target of the acquisition; and

(B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the acquisition

or the aid furnished that such electronic communication service provider wishes to maintain.

(2) Compensation

The Government shall compensate, at the prevailing rate, an electronic communication service provider for providing information, facilities, or assistance in accordance with a directive issued pursuant to paragraph (1).

(3) Release from liability

No cause of action shall lie in any court against any electronic communication service provider for providing any information, facilities, or assistance in accordance with a directive issued pursuant to paragraph (1).

(4) Challenging of directives

(A) Authority to challenge

An electronic communication service provider receiving a directive issued pursuant to paragraph (1) may file a petition to modify or set aside such directive with the Foreign Intelligence Surveillance Court, which shall have jurisdiction to review such petition.

(B) Assignment

The presiding judge of the Court shall assign a petition filed under subparagraph (A) to 1 of the judges serving in the pool established under section 1803(e)(1) of this title not later than 24 hours after the filing of such petition.

(C) Standards for review

A judge considering a petition filed under subparagraph (A) may grant such petition only if the judge finds that the directive does not meet the requirements of this section, or is otherwise unlawful.

(D) Procedures for initial review

A judge shall conduct an initial review of a petition filed under subparagraph (A) not later than 5 days after being assigned such petition. If the judge determines that such petition does not consist of claims, defenses, or other legal contentions that are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, the judge shall immediately deny such petition and affirm the directive or any part of the directive that is the subject of such petition and order the recipient to comply with the directive or any part of it. Upon making a determination under this subparagraph or promptly thereafter, the judge shall provide a written statement for the record of the reasons for such determination.

(E) Procedures for plenary review

If a judge determines that a petition filed under subparagraph (A) requires plenary review, the judge shall affirm, modify, or set aside the directive that is the subject of such petition not later than 30 days after being assigned such petition. If the judge does not set aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall

provide a written statement for the record of the reasons for a determination under this subparagraph.

(F) Continued effect

Any directive not explicitly modified or set aside under this paragraph shall remain in full effect.

(G) Contempt of Court

Failure to obey an order issued under this paragraph may be punished by the Court as contempt of court.

(5) Enforcement of directives

(A) Order to compel

If an electronic communication service provider fails to comply with a directive issued pursuant to paragraph (1), the Attorney General may file a petition for an order to compel the electronic communication service provider to comply with the directive with the Foreign Intelligence Surveillance Court, which shall have jurisdiction to review such petition.

(B) Assignment

The presiding judge of the Court shall assign a petition filed under subparagraph (A) to 1 of the judges serving in the pool established under section 1803(e)(1) of this title not later than 24 hours after the filing of such petition.

(C) Procedures for review

A judge considering a petition filed under subparagraph (A) shall, not later than 30 days after being assigned such petition, issue an order requiring

the electronic communication service provider to comply with the directive or any part of it, as issued or as modified, if the judge finds that the directive meets the requirements of this section and is otherwise lawful. The judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

(D) Contempt of Court

Failure to obey an order issued under this paragraph may be punished by the Court as contempt of court.

(E) Process

Any process under this paragraph may be served in any judicial district in which the electronic communication service provider may be found.

(6) Appeal

(A) Appeal to the Court of Review

The Government or an electronic communication service provider receiving a directive issued pursuant to paragraph (1) may file a petition with the Foreign Intelligence Surveillance Court of Review for review of a decision issued pursuant to paragraph (4) or (5). The Court of Review shall have jurisdiction to consider such petition and shall provide a written statement for the record of the reasons for a decision under this subparagraph.

(B) Certiorari to the Supreme Court

The Government or an electronic communication service provider receiving a directive issued pursu-

ant to paragraph (1) may file a petition for a writ of certiorari for review of a decision of the Court of Review issued under subparagraph (A). The record for such review shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision.

(i) Judicial review of certifications and procedures

(1) In general

(A) Review by the Foreign Intelligence Surveillance Court

The Foreign Intelligence Surveillance Court shall have jurisdiction to review a certification submitted in accordance with subsection (g) and the targeting and minimization procedures adopted in accordance with subsections (d) and (e), and amendments to such certification or such procedures.

(B) Time period for review

The Court shall review a certification submitted in accordance with subsection (g) and the targeting and minimization procedures adopted in accordance with subsections (d) and (e) and shall complete such review and issue an order under paragraph (3) not later than 30 days after the date on which such certification and such procedures are submitted.

(C) Amendments

The Attorney General and the Director of National Intelligence may amend a certification submitted in accordance with subsection (g) or the targeting and minimization procedures adopted in accordance with subsections (d) and (e) as necessary at any time,

including if the Court is conducting or has completed review of such certification or such procedures, and shall submit the amended certification or amended procedures to the Court not later than 7 days after amending such certification or such procedures. The Court shall review any amendment under this subparagraph under the procedures set forth in this subsection. The Attorney General and the Director of National Intelligence may authorize the use of an amended certification or amended procedures pending the Court's review of such amended certification or amended procedures.

(2) Review

The Court shall review the following:

(A) Certification

A certification submitted in accordance with subsection (g) to determine whether the certification contains all the required elements.

(B) Targeting procedures

The targeting procedures adopted in accordance with subsection (d) to assess whether the procedures are reasonably designed to—

(i) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(ii) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.

(C) Minimization procedures

The minimization procedures adopted in accordance with subsection (e) to assess whether such procedures meet the definition of minimization procedures under section 1801(h) of this title or section 1821(4) of this title, as appropriate.

(3) Orders

(A) Approval

If the Court finds that a certification submitted in accordance with subsection (g) contains all the required elements and that the targeting and minimization procedures adopted in accordance with subsections (d) and (e) are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States, the Court shall enter an order approving the certification and the use, or continued use in the case of an acquisition authorized pursuant to a determination under subsection (c)(2), of the procedures for the acquisition.

(B) Correction of deficiencies

If the Court finds that a certification submitted in accordance with subsection (g) does not contain all the required elements, or that the procedures adopted in accordance with subsections (d) and (e) are not consistent with the requirements of those subsections or the fourth amendment to the Constitution of the United States, the Court shall issue an order directing the Government to, at the Government's election and to the extent required by the Court's order—

(i) correct any deficiency identified by the Court's order not later than 30 days after the date on which the Court issues the order; or

(ii) cease, or not begin, the implementation of the authorization for which such certification was submitted.

(C) Requirement for written statement

In support of an order under this subsection, the Court shall provide, simultaneously with the order, for the record a written statement of the reasons for the order.

(4) Appeal

(A) Appeal to the Court of Review

The Government may file a petition with the Foreign Intelligence Surveillance Court of Review for review of an order under this subsection. The Court of Review shall have jurisdiction to consider such petition. For any decision under this subparagraph affirming, reversing, or modifying an order of the Foreign Intelligence Surveillance Court, the Court of Review shall provide for the record a written statement of the reasons for the decision.

(B) Continuation of acquisition pending rehearing or appeal

Any acquisition affected by an order under paragraph (3)(B) may continue—

(i) during the pendency of any rehearing of the order by the Court en banc; and

(ii) if the Government files a petition for review of an order under this section, until the Court of Review enters an order under subparagraph (C).

(C) Implementation pending appeal

Not later than 60 days after the filing of a petition for review of an order under paragraph (3)(B) directing the correction of a deficiency, the Court of Review shall determine, and enter a corresponding order regarding, whether all or any part of the correction order, as issued or modified, shall be implemented during the pendency of the review.

(D) Certiorari to the Supreme Court

The Government may file a petition for a writ of certiorari for review of a decision of the Court of Review issued under subparagraph (A). The record for such review shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision.

(5) Schedule

(A) Reauthorization of authorizations in effect

If the Attorney General and the Director of National Intelligence seek to reauthorize or replace an authorization issued under subsection (a), the Attorney General and the Director of National Intelligence shall, to the extent practicable, submit to the Court the certification prepared in accordance with subsection (g) and the procedures adopted in accordance with subsections (d) and (e) at least 30 days prior to the expiration of such authorization.

(B) Reauthorization of orders, authorizations, and directives

If the Attorney General and the Director of National Intelligence seek to reauthorize or replace an authorization issued under subsection (a) by filing a certification pursuant to subparagraph (A), that authorization, and any directives issued thereunder and any order related thereto, shall remain in effect, notwithstanding the expiration provided for in subsection (a), until the Court issues an order with respect to such certification under paragraph (3) at which time the provisions of that paragraph and paragraph (4) shall apply with respect to such certification.

(j) Judicial proceedings

(1) Expedited judicial proceedings

Judicial proceedings under this section shall be conducted as expeditiously as possible.

(2) Time limits

A time limit for a judicial decision in this section shall apply unless the Court, the Court of Review, or any judge of either the Court or the Court of Review, by order for reasons stated, extends that time as necessary for good cause in a manner consistent with national security.

(k) Maintenance and security of records and proceedings

(1) Standards

The Foreign Intelligence Surveillance Court shall maintain a record of a proceeding under this section, including petitions, appeals, orders, and statements of

reasons for a decision, under security measures adopted by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.

(2) Filing and review

All petitions under this section shall be filed under seal. In any proceedings under this section, the Court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information.

(3) Retention of records

The Attorney General and the Director of National Intelligence shall retain a directive or an order issued under this section for a period of not less than 10 years from the date on which such directive or such order is issued.

***(l)* Assessments and reviews**

(1) Semiannual assessment

Not less frequently than once every 6 months, the Attorney General and Director of National Intelligence shall assess compliance with the targeting and minimization procedures adopted in accordance with subsections (d) and (e) and the guidelines adopted in accordance with subsection (f) and shall submit each assessment to—

(A) the Foreign Intelligence Surveillance Court; and

(B) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution—

(i) the congressional intelligence committees; and

(ii) the Committees on the Judiciary of the House of Representatives and the Senate.

(2) **Agency assessment**

The Inspector General of the Department of Justice and the Inspector General of each element of the intelligence community authorized to acquire foreign intelligence information under subsection (a), with respect to the department or element of such Inspector General—

(A) are authorized to review compliance with the targeting and minimization procedures adopted in accordance with subsections (d) and (e) and the guidelines adopted in accordance with subsection (f);

(B) with respect to acquisitions authorized under subsection (a), shall review the number of disseminated intelligence reports containing a reference to a United States-person identity and the number of United States-person identities subsequently disseminated by the element concerned in response to requests for identities that were not referred to by name or title in the original reporting;

(C) with respect to acquisitions authorized under subsection (a), shall review the number of targets that were later determined to be located in the

United States and, to the extent possible, whether communications of such targets were reviewed; and

(D) shall provide each such review to—

(i) the Attorney General;

(ii) the Director of National Intelligence; and

(iii) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution—

(I) the congressional intelligence committees; and

(II) the Committees on the Judiciary of the House of Representatives and the Senate.

(3) Annual review

(A) Requirement to conduct

The head of each element of the intelligence community conducting an acquisition authorized under subsection (a) shall conduct an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition. The annual review shall provide, with respect to acquisitions authorized under subsection (a)—

(i) an accounting of the number of disseminated intelligence reports containing a reference to a United States-person identity;

(ii) an accounting of the number of United States-person identities subsequently dissemi-

nated by that element in response to requests for identities that were not referred to by name or title in the original reporting;

(iii) the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed; and

(iv) a description of any procedures developed by the head of such element of the intelligence community and approved by the Director of National Intelligence to assess, in a manner consistent with national security, operational requirements and the privacy interests of United States persons, the extent to which the acquisitions authorized under subsection (a) acquire the communications of United States persons, and the results of any such assessment.

(B) Use of review

The head of each element of the intelligence community that conducts an annual review under subparagraph (A) shall use each such review to evaluate the adequacy of the minimization procedures utilized by such element and, as appropriate, the application of the minimization procedures to a particular acquisition authorized under subsection (a).

(C) Provision of review

The head of each element of the intelligence community that conducts an annual review under subparagraph (A) shall provide such review to—

(i) the Foreign Intelligence Surveillance Court;

(ii) the Attorney General;

(iii) the Director of National Intelligence; and

(iv) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution—

(I) the congressional intelligence committees; and

(II) the Committees on the Judiciary of the House of Representatives and the Senate.

8. 50 U.S.C. 1881e (Supp. II 2008) provides in pertinent part:

Use of information acquired under this subchapter

(a) Information acquired under section 1881a

Information acquired from an acquisition conducted under section 1881a of this title shall be deemed to be information acquired from an electronic surveillance pursuant to subchapter I for purposes of section 1806 of this title, except for the purposes of subsection (j) of such section.

* * * *

9. 50 U.S.C. 1881f (Supp. II 2008) provides in pertinent part:

Congressional oversight

(a) Semiannual report

Not less frequently than once every 6 months, the Attorney General shall fully inform, in a manner consistent with national security, the congressional intelligence committees and the Committees on the Judiciary of the Senate and the House of Representatives, consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution, concerning the implementation of this subchapter.

(b) Content

Each report under subsection (a) shall include—

(1) with respect to section 1881a of this title—

(A) any certifications submitted in accordance with section 1881a(g) of this title during the reporting period;

(B) with respect to each determination under section 1881a(c)(2) of this title, the reasons for exercising the authority under such section;

(C) any directives issued under section 1881a(h) of this title during the reporting period;

(D) a description of the judicial review during the reporting period of such certifications and targeting and minimization procedures adopted in accordance with subsections (d) and (e) of section 1881a of this title and utilized with respect to an acquisition under

such section, including a copy of an order or pleading in connection with such review that contains a significant legal interpretation of the provisions of section 1881a of this title;

(E) any actions taken to challenge or enforce a directive under paragraph (4) or (5) of section 1881a(h) of this title;

(F) any compliance reviews conducted by the Attorney General or the Director of National Intelligence of acquisitions authorized under section 1881a(a) of this title;

(G) a description of any incidents of noncompliance—

(i) with a directive issued by the Attorney General and the Director of National Intelligence under section 1881a(h) of this title, including incidents of noncompliance by a specified person to whom the Attorney General and Director of National Intelligence issued a directive under section 1881a(h) of this title; and

(ii) by an element of the intelligence community with procedures and guidelines adopted in accordance with subsections (d), (e), and (f) of section 1881a of this title; and

(H) any procedures implementing section 1881a of this title;

* * * *

10. 50 U.S.C.1881g (Supp. II 2008) provides:

Savings provision

Nothing in this subchapter shall be construed to limit the authority of the Government to seek an order or authorization under, or otherwise engage in any activity that is authorized under, any other subchapter of this chapter.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 11-1025

Supreme Court, U.S.
FILED
APR 18 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL.,

Petitioners,

—v.—

AMNESTY INTERNATIONAL USA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Charles S. Sims
Matthew J. Morris
Proskauer Rose LLP
1585 Broadway
New York, NY 10036

Jameel Jaffer
Counsel of Record
Steven R. Shapiro
Alexander A. Abdo
Mitra Ebadolahi
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

Arthur N. Eisenburg
Christopher T. Dunn
Melissa Goodman
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

Library of Congress
Law Library

QUESTION PRESENTED

Whether the court of appeals correctly held that plaintiffs–respondents have standing to challenge certain provisions of the FISA Amendments Act of 2008 based on their showing, through uncontroverted affidavits, that: (i) they have already suffered specific present objective injuries that are fairly traceable to those provisions, and (ii) they have an actual and well-founded fear that their communications will be monitored under those provisions in the future.

CORPORATE DISCLOSURE STATEMENT

Each corporate respondent certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. The Foreign Intelligence Surveillance Act 2

B. The Bush Administration's Warrantless Surveillance Program 3

C. The FISA Amendments Act of 2008 5

D. The Record Below 9

E. Procedural History 13

REASONS FOR DENYING THE PETITION 15

I. The Second Circuit's decision was correct. 15

a. Plaintiffs have standing because they have already suffered concrete and identifiable injuries that are fairly traceable to the FAA. 16

b. Plaintiffs have standing because they have an "actual and well-founded fear" that their communications will be monitored under the Act in the future. 23

c. The government's novel theory of standing would insulate the Act from meaningful judicial review. 26

II. Multiple other reasons counsel against granting the government's petition for interlocutory review 28

a. The government will suffer no prejudice if review is delayed until final judgment. ... 28

b. The challenged law is scheduled to sunset in December. ... 31

c. The circuit court decisions that the government contends are divergent are reconcilable. ... 33

CONCLUSION ... 36

TABLE OF AUTHORITIES

CASES

ACLU v. NSA,
493 F.3d 644 (6th Cir. 2007) 33, 34

Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372 (1893) 29, 30

Babbitt v. United Farm Workers Nat'l Union,
442 U.S. 289 (1979) 14, 24

Blum v. Yaretsky,
457 U.S. 991 (1982) 24

Davis v. FEC,
554 U.S. 724 (2008) 24

Dombrowski v. Pfister,
380 U.S. 479 (1965) 23

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 22, 23

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,
240 U.S. 251 (1916) 29

In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008, No. Misc. 08-01,
(FISA Ct. Aug. 27, 2008) 8, 27

In re Sealed Case,
310 F.3d 717 (FISA Ct. Rev. 2002) 26

Laird v. Tatum,
408 U.S. 1 (1972) 17, 18

Larson v. Valente,
456 U.S. 228 (1982) 25

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 15

Meese v. Keene,
481 U.S. 465 (1987) 21, 22, 23

Pennell v. City of San Jose,
485 U.S. 1 (1988) 24

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 19, 24, 25

The Conqueror,
166 U.S. 110 (1897) 29

United Presbyterian Church v. Reagan,
738 F.2d 1375 (D.C. Cir. 1984) 35

United States v. Calandra,
414 U.S. 338 (1974) 27

United States v. Students Challenging Regulatory Agency Procedures (SCRAP),
412 U.S. 669 (1973) 18, 22, 23

United States v. U.S. Dist. Court,
407 U.S. 297 (1972) 2, 23

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 27

Virginia v. Am. Booksellers Ass'n,
484 U.S. 383 (1988) 23

CONSTITUTION

U.S. Const. amend. I 9, 23, 24

U.S. Const. amend. IV ..... *passim*

STATUTES

FISA Amendments Act of 2008,
Pub. L. No. 110-261, 122 Stat. 2436 ..... *passim*

Section 403(b) 31

Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801 *et seq.*) ..... *passim*
50 U.S.C. § 1801(e) 8
50 U.S.C. § 1801(f)(2) 3
50 U.S.C. § 1801(h) 6
50 U.S.C. § 1801(h)(1) 7, 8
50 U.S.C. § 1803(a) 2
50 U.S.C. § 1821(4) 6
50 U.S.C. § 1821(4)(A) 7, 8
50 U.S.C. § 1881a 5, 7, 32
50 U.S.C. § 1881a(a) 5
50 U.S.C. § 1881a(b) 6, 20
50 U.S.C. § 1881a(b)(1) 5
50 U.S.C. § 1881a(c)(2) 5
50 U.S.C. § 1881a(e) 8
50 U.S.C. § 1881a(g)(2)(A)(i) 6
50 U.S.C. § 1881a(g)(2)(A)(iii) 6
50 U.S.C. § 1881a(g)(2)(A)(iv) 6
50 U.S.C. § 1881a(g)(2)(A)(v) 6, 20
50 U.S.C. § 1881a(g)(2)(A)(vi) 6
50 U.S.C. § 1881a(g)(2)(A)(vii) 6
50 U.S.C. § 1881a(g)(4) 7
50 U.S.C. § 1881a(h)(3) 28
50 U.S.C. § 1881a(i) 27

50 U.S.C. § 1881e 26

ADMINISTRATIVE & LEGISLATIVE MATERIALS

154 Cong. Rec. S229 (daily ed. Jan. 24, 2008) (statement of Sen. Rockefeller) 31

154 Cong. Rec. S242 (daily ed. Jan. 24, 2008) (statement of Sen. Dodd) 31

154 Cong. Rec. S251 (daily ed. Jan. 24, 2008) (statement of Sen. Kennedy) 31

FISA Sunsets Extension Act of 2011, S. 149, 112th Cong. (2011) 32

Intelligence Authorization Act for Fiscal Year 2012, S. 1458, 112th Cong. (2011) 32

S. Rep. No. 95-604(I) (1977) 2

OTHER AUTHORITIES

Eugene Gressman et al., *Supreme Court Practice* (9th Ed. 2007) 30, 31

Letter from Sens. Ron Wyden and Mark Udall to Dir. of Nat'l Intelligence James R. Clapper, Jr. (July 14, 2011) 32

Letter from the Dep't of Justice to the ACLU (Nov. 29, 2010) 20

INTRODUCTION

The government petitions for review of an interlocutory judgment of the Court of Appeals for the Second Circuit holding that plaintiffs have standing to challenge the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801 *et seq.*) ("FISA"), as amended by the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA" or "Act"). The FAA authorizes the dragnet surveillance of Americans' international communications. It allows the government to collect these communications *en masse* without specifying the individuals or facilities to be monitored; without observing meaningful limitations on the retention, analysis, and dissemination of acquired information; without individualized warrants based on criminal or foreign intelligence probable cause; and without prior judicial or even administrative determinations that the targets of surveillance are foreign agents or connected in any way, however remotely, to terrorism.

The Court should deny the government's petition. The appellate court correctly held that plaintiffs have standing for two independent reasons—because they have already suffered concrete and specific injuries that are fairly traceable to the Act and because they have an "actual and well-founded fear" that their communications will be monitored under the Act in the future.[1] The government's restrictive view of standing, which has

---

[1] Throughout this brief, respondents are generally referred to as "plaintiffs."

never been endorsed by this Court, would insulate the FAA from judicial review altogether. Multiple factors, moreover, counsel against interlocutory review. The government will suffer no prejudice if review is delayed until final judgment; the Act is scheduled to sunset in December; and the circuit court cases that the government describes as divergent are in fact reconcilable. There is a strong public interest in a judicial determination of the FAA's constitutionality. The district court should be permitted to reach the merits.

STATEMENT OF THE CASE

A. The Foreign Intelligence Surveillance Act

In 1978, Congress enacted the Foreign Intelligence Surveillance Act to regulate government surveillance conducted for foreign intelligence purposes. The statute created the Foreign Intelligence Surveillance Court ("FISA Court") and empowered it to grant or deny government applications for surveillance orders in foreign intelligence investigations. *See* 50 U.S.C. § 1803(a). Congress enacted FISA after this Court held, in *United States v. U.S. District Court*, 407 U.S. 297 (1972), that the Fourth Amendment does not permit warrantless surveillance in intelligence investigations of domestic security threats. FISA was a response to that decision and to a congressional investigation that revealed that the executive branch had engaged in widespread warrantless surveillance of U.S. citizens—including journalists, activists, and members of Congress—"who engaged in no criminal activity and who posed no genuine threat to the national security." S. Rep.

No. 95-604(I), at 6 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3909 (internal quotation marks omitted).

Congress has amended FISA multiple times. In its current form, the statute regulates, among other things, "electronic surveillance," which is defined to include:

> the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States.

50 U.S.C. § 1801(f)(2). Before passage of the FAA, FISA generally foreclosed the government from engaging in "electronic surveillance" without first obtaining individualized and particularized orders from the FISA Court.

B. The Bush Administration's Warrantless Surveillance Program

In late 2001 or early 2002, President Bush secretly authorized the National Security Agency ("NSA") to inaugurate a program of warrantless electronic surveillance inside the United States (the "Program"). Pet. App. 244a (Jaffer Decl. ¶ 3, Ex. A). President Bush publicly acknowledged the Program after *The New York Times* reported its existence in December 2005. Pet. App. 244a (Jaffer Decl. ¶ 4, Ex. B). The President reauthorized the Program repeatedly between 2001 and 2007. Pet. App. 244a (Jaffer Decl. ¶ 5, Ex. C). According to public statements made by senior government officials, the

Program involved the interception of emails and telephone calls that originated or terminated inside the United States. Pet. App. 244a–245a (Jaffer Decl. ¶ 6, Ex. D). The interceptions were not predicated on judicial warrants or any other form of judicial authorization; nor were they predicated on any determination of criminal or foreign intelligence probable cause. Instead, according to then-Attorney General Alberto Gonzales and then-NSA Director Michael Hayden, NSA "shift supervisors" initiated surveillance when in their judgment there was a "reasonable basis to conclude that one party to the communication [was] a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." Pet. App. 244a–245a (Jaffer Decl. ¶¶ 6–8, Exs. D–F).

On January 17, 2007, then-Attorney General Alberto Gonzales publicly announced that a judge of the FISA Court had effectively ratified the Program and that, as a result, "any electronic surveillance that was occurring as part of the [Program] will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." Pet. App. 245a, 312a (Jaffer Decl. ¶ 8, Ex. F). The FISA Court orders issued in January 2007, however, were modified in the spring of that same year. The modifications reportedly narrowed the authority that the FISA Court had extended to the executive branch in January. Pet. App. 245a–246a (Jaffer Decl. ¶ 9, Ex. G). After these modifications, the administration pressed Congress to amend FISA to permit the warrantless surveillance of Americans' international communications.

C. The FISA Amendments Act of 2008

President Bush signed the FAA into law on July 10, 2008. While leaving FISA in place for purely domestic communications, the FAA revolutionized the FISA regime by allowing the mass acquisition, without individualized judicial oversight or supervision, of Americans' international communications.[2] Under the FAA, the Attorney General and Director of National Intelligence ("DNI") can "authorize jointly, for a period of up to 1 year . . . the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. 1881a(a). The government is prohibited from "intentionally target[ing] any person known at the time of the acquisition to be located in the United States," *id.* § 1881a(b)(1), but an acquisition authorized under the FAA may nonetheless sweep up the international communications of U.S. citizens and residents.

Before authorizing surveillance under § 1881a—or, in some circumstances, within seven days of authorizing such surveillance—the Attorney General and the DNI must submit to the FISA Court an application for an order (hereinafter, a "mass acquisition order"). *Id.* § 1881a(a), (c)(2). A mass acquisition order is a kind of blank check, which once obtained permits—without further judicial authorization—whatever surveillance the government may choose to engage in, within broadly drawn parameters, for a period of up to one year. To

---

[2] Plaintiffs use the term "international" to describe communications that either originate or terminate (but not both) outside the United States.

obtain a mass acquisition order, the Attorney General and DNI must provide to the FISA Court "a written certification and any supporting affidavit" attesting that the FISA Court has approved, or that the government has submitted to the FISA Court for approval, "targeting procedures" reasonably designed to ensure that the acquisition is "limited to targeting persons reasonably believed to be located outside the United States," and to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." *Id.* § 1881a(g)(2)(A)(i). The certification and supporting affidavit must also attest that the FISA Court has approved, or that the government has submitted to the FISA Court for approval, "minimization procedures" that meet the requirements of 50 U.S.C. § 1801(h) or § 1821(4). Finally, the certification and supporting affidavit must attest that the Attorney General has adopted "guidelines" to ensure compliance with the limitations set out in § 1881a(b); that the targeting procedures, minimization procedures, and guidelines are consistent with the Fourth Amendment; and that "a significant purpose of the acquisition is to obtain foreign intelligence information." *Id.* § 1881a(g)(2)(A)(iii)–(vii).

Importantly, the Act does not require the government to demonstrate to the FISA Court that its surveillance targets are foreign agents, engaged in criminal activity, or connected even remotely with terrorism. Indeed, the statute does not require the government to identify its surveillance targets at all. Moreover, the statute expressly provides that the government's certification is not required to identify

the facilities, telephone lines, email addresses, places, premises, or property at which its surveillance will be directed. *Id.* § 1881a(g)(4).

Thus, a single mass acquisition order may be used to justify the surveillance of communications implicating thousands or even millions of U.S. citizens and residents. It could authorize the acquisition of all communications to and from specific countries of foreign policy interest—for example Russia, Iran, or Israel—including communications to and from U.S. citizens and residents. It could authorize the acquisition of all communications of European attorneys who work with American attorneys on behalf of prisoners held at Guantánamo. To effect such surveillance under the FAA, the government would have to "target" people overseas, but that targeting of people overseas would guarantee the collection of countless Americans' private communications.

Nor does the Act place meaningful limits on the government's retention, analysis, and dissemination of information that relates to U.S. citizens and residents. The Act requires the government to adopt "minimization procedures," *id.* § 1881a, that are "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons," *id.* §§ 1801(h)(1), 1821(4)(A). The Act does not, however, prescribe specific minimization procedures or give the FISA Court any authority to oversee the implementation of those procedures. Moreover, the FAA specifically allows the government to retain and disseminate information—

including information relating to U.S. citizens and residents—if the government concludes that it is "foreign intelligence information." *Id.* § 1881a(e) (referring to *id.* §§ 1801(h)(1), 1821(4)(A)). The phrase "foreign intelligence information" is defined broadly to include, among other things, all information concerning terrorism, national security, and foreign affairs. *Id.* § 1801(e).

As the FISA Court has itself acknowledged, its role in authorizing and supervising FAA surveillance is "narrowly circumscribed." *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01, slip op. at 3 (FISA Ct. Aug. 27, 2008) (internal quotation marks omitted).[3] The judiciary's traditional role under the Fourth Amendment is to serve as a gatekeeper for particular acts of surveillance, but its role under the FAA is simply to issue advisory opinions blessing in advance the vaguest of parameters, under which the government is then free to conduct surveillance for up to one year. The FISA Court does not consider individualized and particularized surveillance applications, does not make individualized probable cause determinations, and does not supervise the implementation of the government's targeting or minimization procedures. In short, the role that the FISA Court plays under the FAA bears no resemblance to the role that it has traditionally played under FISA.

---

[3] This opinion is available at http://www.aclu.org/pdfs/safefree/fisc_decision.pdf.

D. The Record Below

Plaintiffs commenced this action on July 10, 2008, contending that the FAA unconstitutionally impaired their privacy and free speech rights. Plaintiffs alleged, in particular, that the statute violated the First and Fourth Amendments, as well as Article III and the principle of separation of powers, by authorizing the government to conduct dragnet, warrantless surveillance of the international communications of U.S. citizens and residents. Plaintiffs sought a declaration that the law is unconstitutional and an order permanently enjoining its use. In support of their motion for summary judgment, plaintiffs submitted nine declarations, including two expert declarations. The government opposed plaintiffs' motion and cross-moved for summary judgment, but without submitting any evidence. Pet. App. 17a ("The government did not submit any evidence of its own either in opposition to the plaintiffs' submissions, or in support of its own summary judgment motion."). Accordingly, the factual record below consisted entirely of evidence submitted by plaintiffs and not challenged by defendants.[4]

As set forth in the record: plaintiffs are attorneys and human rights, labor, legal, and media

---

[4] Pet. App. 77a ("In opposing the plaintiffs' motion for summary judgment, and in responding to the plaintiffs' Statement of Undisputed Facts pursuant to Local Rule 56.1 . . . the Government [made] no reference to any evidence except that submitted by the plaintiffs. . . . At oral argument, the government clarified that it was accepting the factual submissions of the plaintiffs as true for purposes of these motions.").

organizations whose work requires them to engage in sensitive and sometimes privileged telephone and email communications with colleagues, clients, journalistic sources, witnesses, experts, foreign government officials, and victims of human rights abuses located outside the United States. Pet. App. 399a. Because of the nature of their communications and the identities and geographic location of the individuals with whom they communicate, plaintiffs reasonably believe that their confidential communications will be acquired, analyzed, retained, and disseminated under the FAA.

As further set forth in plaintiffs' declarations, some plaintiffs communicate by telephone and email with people the government believes or believed to be associated with terrorist organizations. Pet. App. 349a–351a (Royce Decl. ¶¶ 3–6) (discussing Royce's communications in relation to her representation of Mohammedou Ould Salahi, a prisoner held at Guantánamo Bay); Pet. App. 343a–344a (Mariner Decl. ¶ 8) (discussing Mariner's communications with individuals who were previously held in CIA custody abroad); Pet. App. 357a (Walsh Decl. ¶ 6) (discussing Washington Office on Latin America (WOLA) staff members' communications with individuals charged under El Salvador's anti-terrorism legislation).

Several plaintiffs communicate by telephone and email with political and human rights activists who oppose governments that are supported economically or militarily by the United States. Pet. App. 337a (Klein Decl. ¶¶ 6–7) (discussing Klein's communications with foreign political activists and political groups in, among other countries, Colombia); Pet. App. 357a (Walsh Decl. ¶ 6) (discussing WOLA

staff members' communications with leaders of protest movements in El Salvador).

Some plaintiffs communicate by telephone and email with people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Pet. App. 343a–344a (Mariner Decl. ¶ 8) (discussing Mariner's communications with people in the Middle East, North Africa, Central Asia, and South Asia); Pet. App. 356a–357a, 361a (Walsh Decl. ¶¶ 5, 11) (discussing WOLA staff members' communications with people in, among other countries, Colombia, Cuba, and Venezuela); Pet. App. 365a–366a (Hedges Decl. ¶¶ 4, 7) (discussing Hedges' communications with contacts in Iran, Syria, Libya, Kosovo, Bosnia, Sudan, and Palestine).

All plaintiffs exchange information that constitutes "foreign intelligence information" within the meaning of the FAA. Pet. App. 352a–353a (Royce Decl. ¶ 8); Pet. App. 343a–344a (Mariner Decl. ¶ 8); Pet. App. 356a–361a (Walsh Decl. ¶¶ 5–6, 8–9, 11); Pet. App. 336a–337a (Klein Decl. ¶¶ 5–6); Pet. App. 366a (Hedges Decl. ¶ 7).

The undisputed record shows that the FAA injures plaintiffs by disrupting their ability to engage in confidential communications that are integral to their professional activities. Pet. App. 351a–353a (Royce Decl. ¶¶ 7–9); Pet. App. 344a–346a (Mariner Decl. ¶¶ 9–11); Pet. App. 357a–362a (Walsh Decl. ¶¶ 7, 9–13); Pet. App. 337a–338a (Klein Decl. ¶¶ 7–9). It compromises plaintiffs' ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and engage in other legitimate and

constitutionally protected communications. Pet. App. 353a (Royce Decl. ¶ 9); Pet. App. 345a (Mariner Decl. ¶ 10); Pet. App. 359a–362a (Walsh Decl. ¶¶ 9–13); Pet. App. 338a (Klein Decl. ¶ 9); Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 372a–373a (McKay Decl. ¶¶ 10–11); Pet. App. 381a–382a, 386a–387a (Gillers Decl. ¶¶ 10, 12, 23). It has particularly serious consequences for those plaintiffs who are attorneys. Pet. App. 351a–353a (Royce Decl. ¶¶ 6–9); Pet. App. 371a–373a, 375a (McKay Decl. ¶¶ 8–11, 14); Pet. App. 381a–387a (Gillers Decl. ¶¶ 10–23).

The challenged law compels plaintiffs to take costly and burdensome measures to protect the confidentiality of sensitive and privileged communications. Pet. App. 338a (Klein Decl. ¶ 9); Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 371a–373a, 375a (McKay Decl. ¶¶ 8, 10–11, 14). Some plaintiffs have already forgone communications that are particularly sensitive. Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 371a–373a (McKay Decl. ¶¶ 8, 10).

The record establishes that plaintiffs' concerns are not merely subjective and that the measures they have taken to protect the privacy of their communications are not discretionary. Plaintiffs submitted the expert declaration of Professor Stephen Gillers, a nationally known legal ethicist. Professor Gillers describes the attorney-plaintiffs' dilemma in these terms:

> Because of the status of their clients, the identity and location of witnesses and sources, and the breadth of the FAA authority, [the lawyer plaintiffs] have good reason to believe that the persons

> abroad with whom they must communicate to satisfy their professional obligations will be or are targets of the authority granted the government under the FAA. . . . Under these circumstances, the lawyer plaintiffs have an ethical obligation to limit their telephonic and electronic communications with persons abroad to routine and non-sensitive information.

Pet. App. 383a–384a (Gillers Decl. ¶ 16).

In sum, undisputed record evidence establishes that plaintiffs reasonably fear that the FAA will be used to acquire their communications; that the statute has already compelled them to take costly and burdensome measures to protect the privacy of their communications; and that the measures they have taken are not simply prudent and reasonable responses to the threat presented by the statute but, at least in some instances, required by codes of professional conduct.

E. Procedural History

The district court denied plaintiffs' motion for summary judgment and entered summary judgment for defendants, holding that plaintiffs lacked standing. Pet. App. 63a. The court held that plaintiffs had failed to establish an actual and well-founded fear of harm because they had not shown that they were "subject to" the statute they challenged. Pet. App. 96a–97a. The court reached that conclusion because the statute does not directly regulate plaintiffs' conduct and (in its view) does not "require [them] to do anything." Pet. App. 96a. The

court also found relevant, and perhaps dispositive, that the challenged statute does not directly authorize surveillance but rather permits the FISA Court to authorize it. Pet. App. 89a. Notwithstanding the undisputed factual record, the district court concluded that plaintiffs' fear that their communications would be acquired under the challenged law was merely speculative. Pet. App. 85a. The district court also rejected plaintiffs' second asserted basis for standing—that the statute had already caused them to suffer concrete injuries. It held that these injuries amounted only to the kind of "subjective chill" that the courts had found insufficient in earlier cases. Pet. App. 101a–103a.

A unanimous three-judge panel of the Second Circuit vacated the district court's judgment and upheld plaintiffs' standing. As an initial matter, the court held that plaintiffs had established injury in fact because of the additional burdens and expenses they had incurred to preserve the confidentiality of their communications. The court then held that this injury was fairly traceable to the FAA because it was an "appropriate" and "reasonable" response, Pet. App. 48a–49a, to the "realistic danger," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), that their communications would be intercepted under the FAA. Pet. App. 30a. Because of that "realistic danger," the court also concluded that plaintiffs had established a likelihood of future injury that provided an independent basis to recognize standing. Noting that the government had contested neither plaintiffs' evidence, Pet. App. 26a, nor their construction of the challenged statute, Pet. App. 36a & n.21, the court described the threat that plaintiffs' communications would be intercepted as

"real and immediate," not "conjectural or hypothetical." Pet. App. 29a. In so doing, the court rejected the government's argument that plaintiffs could establish standing only by showing that interception of their communications was "certain" or "effectively certain." Pet. App. 30a. Finally, the court ruled that the equitable relief that plaintiffs are seeking would redress the constitutionally cognizable injuries they had suffered.

The government's petition for rehearing en banc was denied by a 6-6 vote.[5] Pet. App. 114a–115a.

REASONS FOR DENYING THE PETITION

I. The Second Circuit's decision was correct.

To satisfy the standing requirements of Article III, plaintiffs must establish that (i) they have suffered a "concrete and particularized" injury that is "actual or imminent" rather than "conjectural" or "hypothetical"; (ii) there is a causal connection between their injury and the challenged statute or conduct, such that the injury is "fairly traceable" to the defendant's alleged violation; and (iii) it is "likely" that their injury would be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

---

[5] Judge Hall dissented from the denial of rehearing en banc solely because he believed that the case involved a question of exceptional importance warranting en banc review. Pet. App. 196a. As senior judges, Judges Calabresi and Sack, two of the members of the panel that upheld plaintiffs' standing, were not eligible to participate in deciding whether to grant the government's petition for rehearing en banc. Pet. App. 116a n.1.

Applying this standard, the Second Circuit correctly concluded that plaintiffs have standing for two independent reasons. First, plaintiffs have suffered present injuries that are fairly traceable to the FAA: because of professional and ethical obligations, they have taken costly and burdensome measures to protect their sensitive communications from interception. *See, e.g.*, Pet. App. 28a. Second, plaintiffs have established justiciable future injuries, because they have demonstrated a "realistic danger" that their communications will be monitored under the Act. *See, e.g.*, Pet. App. 30a–31a. The court of appeals rightly held that both of these injuries would be redressed by a favorable ruling. Pet. App. 40a–41a & n.24.

a. Plaintiffs have standing because they have already suffered concrete and identifiable injuries that are fairly traceable to the FAA.

Plaintiffs have satisfied the injury-in-fact requirement by demonstrating, through uncontroverted evidence, that the challenged statute has already caused them to suffer professional and economic harms. The court of appeals accurately characterized this present injury as "the most mundane of injuries in fact." Pet. App. 26a.

As the Second Circuit observed, Pet. App. 26a, 36a–41a, 43a, 47a–50a, the undisputed evidence establishes that the FAA has caused the plaintiffs concrete injuries by compelling them to take costly and burdensome measures to protect the confidentiality of their international communications. In some instances, the statute has compelled them to forgo certain particularly sensitive

communications altogether. *See, e.g.*, Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 371a–373a (McKay Decl. ¶¶ 8, 10). Some plaintiffs are compelled to travel long distances at considerable expense to collect information in person that they otherwise would have been able to collect over the phone or by email. *See, e.g.*, Pet. App. 367a (Hedges Decl. ¶ 9). In some instances, third parties have refused to share information with plaintiffs because of the risk that the government may be monitoring their communications. *See, e.g.*, Pet. App. 338a (Klein Decl. ¶ 8–9); Pet. App. 352a–353a (Royce Decl. ¶ 8). As a result, the challenged statute has compromised plaintiffs' ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and engage in other legitimate and constitutionally protected communications. *See, e.g.*, Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 372a–375a (McKay Decl. ¶¶ 10–11, 13–14); Pet. App. 381a–382a, 386a–387a (Gillers Decl. ¶¶ 10, 12, 23).

The government denigrates plaintiffs' injuries as mere "subjective chill," Pet. 23–24, of the kind this Court found insufficient to support standing in *Laird v. Tatum*, 408 U.S. 1 (1972). This case, however, bears little resemblance to that one. *See* Pet. App. 50a–60a. *Laird* involved a challenge to a surveillance program, but the information gathered under the challenged program was "nothing more than a good newspaper reporter would [have been] able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." 408 U.S. at 9. Moreover, the *Laird* plaintiffs acknowledged that they in fact had not been "cowed and chilled" by the threat of the

surveillance. *Id.* at 14 n.7. The *Laird* plaintiffs were found to lack standing because, in the Court's view, they failed to demonstrate *any* injury. *Laird* certainly did not involve the kinds of injuries asserted here.

Nor did *Laird* purport to set out a new and virtually prohibitive standing rule for challenges to government surveillance. Indeed, *Laird* expressly distinguished allegations of "subjective chill," which it held to be inadequate to establish injury in fact, from allegations of "specific present objective harm," which it indicated *would* be sufficient. *Id.* at 13–14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." (citation omitted)); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1973) (stating that plaintiffs who allege "specific and perceptible harm that distinguishe[s] them from other citizens" will have presented a cognizable injury).

Plaintiffs here have suffered the kinds of "specific present objective harms" that *Laird* made clear are sufficient to support standing. Unlike the *Laird* plaintiffs, plaintiffs here have pointed to specific instances in which their professional work has been compromised because of the FAA. Unlike the *Laird* plaintiffs, plaintiffs here have demonstrated that they have already suffered economic harm because of the statute. And whereas the plaintiffs in *Laird* had not altered their conduct in response to the challenged program, plaintiffs here *have* altered their conduct in ways that are not only prudent and reasonable but, at least in some

instances, obligatory under codes of professional conduct. As the appeals court observed, "[t]his case is a far cry from *Laird*." Pet. App. 54a.[6]

The government's argument that plaintiffs' *present* injuries are not injuries within the meaning of Article III, Pet. 23, conflates the first two prongs of the Article III standing inquiry: injury in fact and causation. *See* Pet. App. 43a ("The heart of the government's challenge to the plaintiffs' standing based on the indirectness of their injury . . . goes to whether the plaintiffs' injuries are causally connected to the challenged legislation."). Plaintiffs have unquestionably suffered an injury in fact by incurring certain costs and forgoing certain communications. The relevant question, then, is simply whether the FAA caused this injury. The answer to that question does not turn on the imminence of the injury—an issue relevant only in determining the justiciability of *future* injury. *See* Pet. 23–25. Rather, it turns on whether plaintiffs' present injury is "fairly traceable to the challenged action." *Summers*, 555 U.S. at 493.

Plaintiffs' injuries are fairly traceable to the FAA. As the court of appeals observed, Pet. App. 37a, the FAA plainly authorizes the acquisition of plaintiffs' international communications. On its face, it authorizes the government to monitor any international communication as long as (i) the government's surveillance "targets" are non-U.S.

---

[6] Much of the government's petition turns on this Court's decision in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). That decision concerned the showing necessary to establish *future* harm. *See, e.g., id.* at 495–96. It is not relevant to plaintiffs' claim of standing based upon their present injuries.

persons outside the United States, and (ii) the programmatic purpose of any particular surveillance program is to gather "foreign intelligence information." 50 U.S.C. § 1881a(b), (g)(2)(A)(v). While the parties disagreed about the significance of the statute's minimization requirements—that is, the statute's restrictions on the government's use, retention, and dissemination of acquired communications—not even the government proposed that these requirements protected plaintiffs' communications against interception in the first instance. To the contrary, the government expressly acknowledged that plaintiffs' communications could be intercepted under the Act. Defendants' Memorandum in Support of Defendants' Cross-Motion for Summary Judgment at 33, *Amnesty Int'l v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009) (No. 1:08-CV-6259), ECF No. 10 (acknowledging that Americans' communications can be acquired as an "incident" to surveillance of overseas targets).[7]

Plaintiffs established not only that the FAA could be used to monitor their international communications but that their communications were *likely* to be monitored under it. The Second Circuit correctly noted that plaintiffs communicated with "precisely the sorts of individuals that the government will most likely seek to monitor":

---

[7] Since oral argument before the Second Circuit, the government has released several hundred pages of documents under the Freedom of Information Act relating to the FAA. Those records confirm that the government is in fact using the FAA. *See* Letter from the Dep't of Justice to the ACLU (Nov. 29, 2010), *available at* http://www.aclu.org/national-security/faa-foia-documents.

individuals whom the U.S. government believes to be terrorists, or to be associated with terrorists; political and human rights activists who oppose governments that the United States supports economically or militarily; and individuals located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Pet. App. 37a. The Second Circuit found that "plaintiffs' assessment that these individuals are likely targets of FAA surveillance is reasonable." Pet. App. 37a. It observed, moreover, that "the government [had] not disputed that assertion." Pet. App. 37a.

For these reasons, plaintiffs' present injuries are fairly traceable to the FAA.

The government's chief response—that plaintiffs' injuries are "self-imposed," Pet. 24—ignores the record and misunderstands the law. Plaintiffs' uncontroverted declarations establish that the FAA *compels* them to take costly and burdensome measures to protect the confidentiality of their communications. In theory, of course, plaintiffs could have declined to take these measures and simply suffered the consequences, including, in the case of the attorney-plaintiffs, violation of controlling ethical rules and exposure to possible bar discipline. The law is clear, however, that where a defendant's conduct puts a plaintiff to this kind of "choice," the plaintiff has standing to challenge that conduct.

This Court's decision in *Meese v. Keene*, 481 U.S. 465 (1987), is instructive. In that case a state legislator sued to enjoin application of a statute that required the National Film Board of Canada to

register certain documentaries as "political propaganda." *Id.* at 467–68. While the statute did not impose any obligation on the plaintiff, the plaintiff submitted evidence that he would suffer reputational harm if he were to screen films that the government had labeled "political propaganda." *Id.* at 473. Although the plaintiff's choice to avoid the injury by simply declining to screen the films was voluntary in some sense, *id.* at 475, this Court held that he nonetheless had standing because "the Act 'puts the plaintiff to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation.'" *Id.* (quoting approvingly the district court decision).

The Court's decisions in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), and *SCRAP* also supply useful guidance. In *Laidlaw*, environmental organizations brought suit under the Clean Water Act against a corporation that they alleged was exceeding statutory limits on the discharge of certain pollutants. The plaintiffs' asserted injury consisted of their cessation of certain activities—for example swimming, camping, and bird-watching—for fear of exposure to pollution discharged by the defendant. *Id.* at 182. The Court held that the injuries were not self-inflicted but reasonable responses to the threat of exposure to contaminated water. *Id.* at 183–84. In *SCRAP*, similarly, plaintiffs' injuries consisted principally of their decision to forgo the use of certain natural resources—"forests, streams, mountains, and other resources"—because of the defendants' allegedly unlawful actions. 412 U.S. at 685. The Court held that plaintiffs who had curtailed their use

of natural resources in response to the defendants' challenged policy had standing to challenge that policy. *Id.*

As in *Meese*, *Laidlaw*, and *SCRAP*, plaintiffs here have taken measures in reasonable response to government conduct that they allege is unlawful. The Second Circuit correctly held that plaintiffs therefore have standing to challenge the conduct.

b. Plaintiffs have standing because they have an "actual and well-founded fear" that their communications will be monitored under the Act in the future.

As the Second Circuit noted, Pet. App. 30a–31a, where First Amendment rights are at stake, plaintiffs can satisfy the injury requirement by demonstrating an "actual and well-founded fear" of future harm. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 384 (1988).[8] The "actual and well-founded fear" test is more lenient than the test that applies outside the First Amendment context, in recognition of the fact that "free expression [is] of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *see also Am. Booksellers Ass'n*,

---

[8] The potential interception of plaintiffs' private communications under the FAA undeniably implicates their First Amendment rights. *See, e.g., U.S. Dist. Court*, 407 U.S. at 313 ("National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech."). The government has not argued otherwise.

484 U.S. at 392–93. Even outside the First Amendment context, however, a plaintiff threatened with injury need not await the consummation of that injury before bringing suit. *Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[T]he injury required for standing need not be actualized."); *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982). It is enough that she demonstrate a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298 (emphasis added); *see also Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988).

The Second Circuit properly concluded that plaintiffs had satisfied not only the First Amendment "actual and well-founded fear" test but also the more stringent one that applies outside the First Amendment context. Pet. App. 31a. As noted above, the court observed that the statute plainly authorizes the acquisition of plaintiffs' international communications, a fact conceded by the government. Pet. App. 36a–37a. Moreover, plaintiffs established that their communications were *likely* to be monitored. Pet. App. 37a (noting that plaintiffs communicated with "precisely the sorts of individuals that the government will most likely seek to monitor"); Pet. App. 37a ("The plaintiffs' assessment that these individuals are likely targets of FAA surveillance is reasonable, and the government has not disputed that assertion.").

The government, relying principally on two sentences from *Summers v. Earth Island Institute*, 555 U.S. 488, 499–500 (2009), argues that the appeals court erred in failing to require that plaintiffs show "imminent" injury, but the government's reliance on *Summers* is misplaced. The

Second Circuit found that plaintiffs' injuries were "real and immediate," Pet. App. 29a; if there is a difference between that standard and the "imminence" standard, it is not a material one. Moreover, *Summers* was a case in which plaintiffs had neither suffered a present injury nor established any substantial likelihood that they would be injured in the future by the regulation they challenged. 555 U.S. at 495 ("There may be a chance, but is hardly a likelihood, that [plaintiff's] wanderings will bring him to a parcel [of the National Forests] about to be affected by a project unlawfully subject to the regulations."). It was a case, in other words, in which the Court concluded that plaintiffs could not satisfy even the most lenient standard for justiciable injury. *Id.* at 500 ("The problem for the dissent is that the timely affidavits no more meet that [lower] requirement than they meet the usual formulation.").

The government also argues that plaintiffs lack standing because the government has "multiple means" of monitoring plaintiffs' communications. Pet. 26. That the government has other means of intercepting communications, however, is beside the point. Plaintiffs have challenged the FAA because that statute has unique procedural defects and because those defects both vastly increase the likelihood that their communications will be monitored and compel them to take measures to protect their communications from interception. This Court has made clear that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." *Larson v. Valente*, 456

U.S. 228, 243 n.15 (1982); *see also* Pet. App. 126a–127a.

The appeals court was correct to find that plaintiffs have standing because of the likelihood that their communications will be monitored in the future.

c. The government's novel theory of standing would insulate the Act from meaningful judicial review.

The appeals court's decision was consistent with well-settled precedent of this Court. The Court should be particularly wary of departing from that precedent here because to accept the government's alternative vision of Article III would effectively insulate the FAA and other foreign-intelligence surveillance statutes from meaningful judicial review.

Neither the FAA nor other foreign intelligence surveillance statutes have general notice requirements, *In re Sealed Case*, 310 F.3d 717, 741 (FISA Ct. Rev. 2002), and accordingly, the vast majority of people whose communications are monitored under these statutes will never learn that their privacy has been compromised. Even those who are criminally prosecuted with FAA-derived evidence are unlikely ever to learn about it. While the FAA requires the government to notify a defendant if it intends to introduce FAA-derived evidence at trial, 50 U.S.C. § 1881e, the notice provision does not require the government to distinguish surveillance conducted under the FAA from surveillance conducted under FISA. Notably, the FAA has been in place for almost four years, but plaintiffs know of

no case in which the government has informed a defendant that it is relying on FAA-derived evidence. Even if it could be assumed that the government would one day introduce FAA-derived evidence in a criminal trial, it would be inconsistent with the purposes of the Fourth Amendment to tell plaintiffs already injured by the FAA that their constitutional rights can be vindicated only if the government in its own discretion decides one day to introduce FAA-derived evidence against someone else. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The Fourth Amendment functions differently [than the Fifth Amendment]. . . . [A] violation of the Amendment is 'fully accomplished' at the time of an unreasonable intrusion." (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974))).

In the appeals court, the government argued that review by the FISA Court would be sufficient to ensure the constitutionality of surveillance carried out under the FAA. However, while the FAA invests the FISA Court with jurisdiction to examine the lawfulness of targeting and minimization procedures, 50 U.S.C. § 1881a(i), that court has stated that "it is not required, in the course of this [1881(a)(i)] review . . . to . . . conduct a facial review of the constitutionality of the statute," *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01, slip op. at 10 (FISA Ct. Aug. 27, 2008). Moreover, the FISA Court's review of the targeting and minimization procedures is conducted *ex parte* and *in camera*. A secret proceeding limited to the narrow review of targeting and minimization procedures is not a substitute for an adversarial and open adjudication of constitutional claims brought by

Americans whose communications may be—and likely already have been—swept up *en masse*.[9]

In the end, what the government disguises as a narrow, technical argument about justiciability reveals itself to be this sweeping proposition: The courts have no meaningful role to play in protecting Americans' international communications from wholesale government surveillance, or even in determining whether that surveillance is consistent with the Constitution. For sound strategic reasons, the government avoids stating the proposition forthrightly, but it is the inescapable consequence of the argument it advances. Nothing in this Court's precedents countenances such a result.

II. Multiple other reasons counsel against granting the government's petition for interlocutory review.

a. The government will suffer no prejudice if review is delayed until final judgment.

The decision of the court of appeals is interlocutory, not final. It does not declare the FAA to be unconstitutional. It does not enjoin any ongoing surveillance program. It does not foreclose the government from relying on the FAA to initiate

---

[9] The FAA gives "electronic communications service providers" the right to challenge the government's surveillance directives before the FISA Court. Third-party service providers, however, will rarely have any incentive to file the kinds of challenges that might protect plaintiffs' rights. *See* 50 U.S.C. § 1881a(h)(3) (providing that "[n]o cause of action shall lie in any court" against electronic communications service providers that comply with directives issued under the FAA).

any new surveillance program. It simply permits plaintiffs who the government *concedes* have been harmed by the FAA, Pet. App. 124a n.6, to challenge the statute's constitutionality. While the Court plainly has jurisdiction to grant interlocutory petitions, review before final judgment is appropriate only in "extraordinary cases," *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257–58 (1916), in which "[t]he facts of the case require an earlier interposition" by the Court, *The Conqueror*, 166 U.S. 110, 114 (1897). *See also Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893) (interlocutory review appropriate only where necessary to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause"). This standard is not satisfied here.

The government's suggestion that its interests will be prejudiced if the district court adjudicates the constitutionality of the FAA "in the abstract, without the essential assistance of concrete facts concerning any actual, imminent surveillance affecting the persons challenging the law," is unpersuasive. The record is replete with "concrete facts," all of them undisputed, describing plaintiffs' basis for believing that their communications will be monitored under the law, the effect the law has already had on plaintiffs' professional activities, and the measures that plaintiffs have already had to take to protect their communications from possible interception. Indeed, the government argued below that the district court could adjudicate the merits of the dispute without further factual development, and it moved for summary judgment on that basis. Pet. App. 2a–3a. Further, there is no material dispute here about the proper construction of the statutory

provisions that plaintiffs challenge; the government did not dispute below that the statute "permits broad monitoring through mass surveillance orders that authorize the government to collect thousands or millions of communications, including communications between the plaintiffs and their overseas contacts." Pet. App. 36a; *see also* Pet. App. 36a ("the government has not controverted [plaintiffs'] interpretation [of the statute] or offered a more compelling one"); Pet. App. 122a ("At oral argument, we asked the government to clarify what it found inaccurate in the plaintiffs' characterization [of the statute's scope], and again it failed to do so.").

In the final paragraph of its petition, the government asserts without explanation that requiring it even to defend the constitutionality of the FAA could result in "disrupt[ion to] important Executive Branch activities protecting the national security." Pet. 34. This assertion is puzzling. The appellate court's decision does not enjoin the government from conducting surveillance under the FAA or any other authority. The government's assertion is nonetheless noteworthy, because it makes clear that the government's concern is not with the possibility that the statute will be subject to judicial review *in this case* but with the possibility that the statute will be subject to judicial review at all.

This is not a case in which interlocutory review is necessary to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co.*, 148 U.S. at 384. The government would suffer no prejudice if review were delayed until final judgment. Eugene Gressman et

al., *Supreme Court Practice* 82 (9th Ed. 2007) ("Supreme Court review of a final judgment opens up the entire case, including all relevant interlocutory orders that may have been entered by the court of appeals or the district court.").

b. The challenged law is scheduled to sunset in December.

When it enacted the FAA in August 2008, Congress provided that the surveillance authorities at issue in this case would expire on December 31, 2012. FAA § 403(b). The sunset provision was meant to ensure that the most far-reaching changes to surveillance law since 1978 would not be made permanent without further debate about the scope of the law, the sufficiency of the law's safeguards for civil liberties, and the manner in which the law was being implemented. *See, e.g.*, 154 Cong. Rec. S229 (daily ed. Jan. 24, 2008) (statement of Sen. Rockefeller) ("This bill provides a significant new authority, and it is essential—because it is a significant new authority in what is still emerging in the collection of intelligence—that we carefully monitor the implementation of this authority and revisit it to ensure it is working as we now envision."); 154 Cong. Rec. S242 (daily ed. Jan. 24, 2008) (statement of Sen. Dodd) ("I believe that, when making such a dramatic change in the Nation's terrorist surveillance regime, we ought to err on the side of some caution. Once the new regime has been tested, once its effectiveness against terrorism and its compromises of privacy have been weighed, we deserve to have this debate again."); 154 Cong. Rec. S251 (daily ed. Jan. 24, 2008) (statement of Sen. Kennedy) ("Because this legislation will make major

untested changes to the FISA system and the pace of technology change will only increase, we should evaluate it sooner rather than later.").[10]

Since the FAA's enactment, Congress has considered proposals to extend § 1881a beyond December 2012. *See, e.g.*, FISA Sunsets Extension Act of 2011, S. 149, 112th Cong. (2011) (proposing to extend § 1881a to the end of 2013); Intelligence Authorization Act for Fiscal Year 2012, S. 1458, 112th Cong. (2011) (proposing to extend § 1881a to the end of 2015). None of these proposals, however, has been adopted. Accordingly, Congress will consider later this year whether to reauthorize the FAA in its current form, modify it, or let it expire. *See* Letter from Sens. Ron Wyden and Mark Udall to Dir. of Nat'l Intelligence James R. Clapper, Jr. (July 14, 2011), *available at* http://1.usa.gov/pHpW4Y (noting that "[i]n the coming months, Congress is likely to consider various legislative initiatives that would modify different aspects of domestic surveillance law" and, in anticipation of such initiatives, requesting information about implementation of FAA).

The uncertainty about the law's future counsels against granting the government's petition. The Court should not reach out to review an interlocutory decision when the statute at the center of the dispute is scheduled to expire within months, and when the statute may be modified in unforeseen ways even if reenacted. Interlocutory review would

---

[10] These three statements are available at http://www.gpo.gov/fdsys/pkg/CREC-2008-01-24/pdf/CREC-2008-01-24-pt1-PgS227-3.pdf.

be particularly ill-advised here because plaintiffs' standing argument turns in part on their contention that the law permits the dragnet surveillance of Americans' international communications. Pet. App. 131a (noting connection between standing argument and the Act's scope); Pet. App. 138a–139a & n.4 (same). If Congress were to modify that feature of the law, plaintiffs' claim to standing would be affected correspondingly.

c. The circuit court decisions that the government contends are divergent are reconcilable.

The government contends that the Second Circuit's decision is in conflict with decisions of the Sixth and D.C. Circuits, but the three decisions are reconcilable, as Judge Lynch noted. Pet. App. 58a & n.32; Pet. App. 130a–131a.

ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), which involved a challenge to the Bush administration's warrantless wiretapping program, concerned the particularized surveillance of individual targets believed to be associated with al Qaeda, whereas the statute at issue here authorizes dragnet surveillance without any determination, judicial or even administrative, of individualized suspicion. This difference is crucial because plaintiffs' injury stems in large part from the scope of the surveillance authority they challenge. It is because of the scope of the FAA that plaintiffs' communications are likely to be intercepted, and it is because plaintiffs' communications are likely to be intercepted that they have been compelled to limit the information they exchange by telephone and

email. Pet. App. 345a–346a (Mariner Decl. ¶ 11); Pet. App. 385a–386a (Gillers Decl. ¶ 21).

ACLU v. NSA is also distinguishable because that case involved a challenge to a surveillance program launched secretly by the executive (and exposed only partially by the media), whereas this case involves a challenge to a public law. There is no question, of course, that executive programs may be subject to judicial challenge. However, the secrecy surrounding the warrantless wiretapping program, whether legitimate or not, made it more difficult for the plaintiffs in *ACLU v. NSA* to establish the precise scope of the program, more difficult for them to show that their communications were likely to be intercepted, and more difficult for them to show that the measures they had taken to protect their communications were objectively reasonable. Here, the political branches have published the scope of the government's surveillance authority, and they have described, in a public law, the safeguards that are meant to protect Americans' rights.

Finally, *ACLU v. NSA* is distinguishable because there the government contended that the question of whether plaintiffs' communications were likely to be acquired under the challenged program could not be answered without the disclosure of information protected by the state secrets privilege. Defendants Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment at 25, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 06-CV-10204), ECF No. 34 (contending that, because of the state secrets privilege, the government would be "unable to present facts that would bear upon the question of

standing—for example, by showing that [plaintiffs] . . . have no reasonable fear of being targeted"). Here, by contrast, the government has not invoked the state secrets privilege and has not controverted plaintiffs' assertion that their communications are likely to be acquired under the statute. To the contrary, the government declined to contest the evidence submitted by the plaintiffs and submitted a cross-motion for summary judgment. Pet. App. 17a–18a.

United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984), is also distinguishable. That case involved what the D.C. Circuit characterized as a challenge to "the constitutionality of the entire national intelligence-gathering system," *id.* at 1381, whereas this case involves a challenge to a specific federal statute brought by plaintiffs who have already suffered concrete injuries because of it. In *United Presbyterian Church*, moreover, the record failed to establish that the harms the plaintiffs had suffered were anything other than subjective and self-imposed. *Id.* Here, plaintiffs have established that the challenged Act has compelled them to take costly and burdensome measures to protect the privacy of their communications. An expert in legal ethics has testified that these measures are not simply prudent and reasonable responses to the challenged law but, at least in some instances, required by the relevant code of professional ethics. The government has failed to dispute any of this evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jameel Jaffer
Counsel of Record
Steven R. Shapiro
Alexander A. Abdo
Mitra Ebadolahi
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004

Arthur N. Eisenburg
Christopher T. Dunn
Melissa Goodman
New York Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004

Charles S. Sims
Matthew J. Morris
Proskauer Rose LLP
1585 Broadway
New York, NY 10036

Dated: April 17, 2012

REPLY BRIEF

No. 11-1025

In the Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

ACLU v. *NSA*, 493 F.3d 644 (6th Cir. 2007), cert. denied, 552 U.S. 1179 (2008) 8, 10
Babbitt v. *United Farm Workers*, 442 U.S. 289 (1979) 3
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 7
Laird v. *Tatum*, 408 U.S. 1 (1972) 7, 8
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 4
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) ... 4
MedImmune, Inc. v. *Genentech, Inc.*, 549 U.S. 118 (2007) 3
Meese v. *Keene*, 481 U.S. 465 (1987) 7
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 8
Summers v. *Earth Island Inst.*, 555 U.S. 488 (2009) 2
United Presbyterian Church v. *Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) 8, 9
United States v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) 7
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 6
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 7

Constitution and statutes: Page

U.S. Const.:
Art. III ..... *passim*
Amend. I 3
Amend. IV 5, 6
Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, as amended (50 U.S.C. 1801 *et seq.* (2006 & Supp. II 2008)):
50 U.S.C. 1881a (Supp. II 2008) ..... *passim*
50 U.S.C. 1881a(b)(5) (Supp. II 2008) 5
50 U.S.C. 1881a(i)(3)(A) (Supp. II 2008) 6
PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, § 2, 125 Stat. 216 11
USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 102-104, 120 Stat. 194-195 11

Miscellaneous:

Letter from Director of National Intelligence James R. Clapper and Attorney General Eric H. Holder to Speaker John Boehner, Majority Leader Harry Reid, Minority Leader Nancy Pelosi, and Minority Leader Mitch McConnell (Feb. 8, 2012), http://www.dni.gov/electronic_reading_room/dni_ag_letter.pdf 11

Miscellaneous—Continued: Page

Letter from Director of National Intelligence James R. Clapper to Speaker John Boehner, Majority Leader Harry Reid, Minority Leader Nancy Pelosi, and Minority Leader Mitch McConnell (Mar. 26, 2012), http://www.dni.gov/electronic_reading_room/dni%20letter%20with%20fisa%20amendments.pdf 11

In the Supreme Court of the United States

No. 11-1025

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents may not be targeted by foreign-intelligence surveillance authorized under 50 U.S.C. 1881a (Supp. II 2008) and have proffered no evidence that they have been or ever will be incidentally subject to such surveillance targeting others abroad. The Second Circuit nevertheless held that respondents have Article III standing to challenge Section 1881a's constitutionality, because it (1) concluded there was an "objectively reasonable likelihood" that Section 1881a-authorized surveillance would collect respondents' communications in the future and (2) determined that respondents' own choice to expend funds to avoid a perceived risk of surveillance is a sufficient Article III "present injury." As the petition shows, that unprecedented ruling conflicts with decisions of other courts of

appeals. Pet. 27-31. It also erroneously permits the constitutionality of an Act of Congress governing vital foreign-intelligence-gathering activities directed at third parties abroad to be litigated in the abstract by (1) failing to require respondents to prove a non-conjectural and "imminent" future injury, Pet. 18-22, and (2) relying on respondents' self-imposed injury, which flows from the asserted chilling effect of their fear of possible surveillance, Pet. 22-27. The court of appeals denied en banc rehearing by an equally divided, six-to-six vote; five judges specifically suggested that this Court grant review; and even the panel opinion's author acknowledged the exceptional importance of this case. Pet. 32.

Respondents nevertheless argue that the court of appeals' decision is correct, Br. in Opp. (Br.) 16-28, and consistent with other decisions, Br. 33-35, and that review should be deferred. Br. 28-33. Those contentions lack merit.

1. a. *Future injury.* Respondents contend (Br. 25) that the court of appeals used an Article III standard "material[ly]" similar to the "imminent"-injury standard by concluding that their purported future injuries were "real and immediate." That is incorrect. The court made clear that it understood "real and immediate" to mean only what it deemed an "objectively reasonable likelihood" of surveillance in the future. Pet. App. 29a. That test falls far short of requiring that respondents' asserted "injury is '*certainly* impending,'" Pet. 18-20 (citation omitted), especially since the court of appeals found its test satisfied in the absence of any concrete, non-speculative evidence demonstrating a likelihood of surveillance. As *Summers* v. *Earth Island Institute*, 555 U.S. 488, 497-500 (2009), explains, a "statistical probability" or "realistic threat" of future harm does not

satisfy "the requirement of 'imminent' harm." Pet. 19-20. Respondents fail meaningfully to confront that holding. Br. 24-25.

Respondents instead assert that a "more lenient" Article III test applies to their asserted future injury because they raise a First Amendment claim. Br. 23-24. Article III's constitutional minimum is not "more lenient" for First Amendment claims and, in any event, the court of appeals emphasized that it did not rely on that "arguably less demanding standard." Pet. App. 30a & n.16.

Respondents find no shelter (Br. 24) in the understanding that a "realistic danger" of prosecution for violating a statute can confer standing to challenge the statute. *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 298 (1979). Article III does not always require a plaintiff to violate the law before securing federal-court review, at least where the law's enforcement against him would be "certainly impending" were the plaintiff to engage in the proscribed conduct. *Ibid.* (citation omitted). A plaintiff need not violate the law and trigger his own prosecution, but that is because the "plaintiff's own action (or inaction) in failing to violate the law eliminates the [otherwise] *imminent* threat of prosecution." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 129 (2007) (emphasis added). Those principles are inapplicable here: Section 1881a does not regulate respondents' conduct and, in any event, respondents have proven no imminent—*i.e.*, certainly impending—interception of their communications.

Respondents attempt to bolster their "future injury" and other contentions by repeatedly asserting that the government "conceded" or did "not dispute" or "controvert[]" various aspects of their case. Br. 24, 29-30, 35;

see also, *e.g.*, Br. 11, 13-14, 16 ("undisputed" or "[un]contested" evidentiary record). Those assertions fundamentally misunderstand the standing inquiry at summary judgment and serve to underscore the court of appeals' error.

It is respondents who "bear[] the burden of proof" and who thus must proffer at summary judgment admissible evidence of "specific facts" affirmatively establishing their Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). Respondents have failed to provide such proof and, instead, rely on "conclusory allegations" in their declarations, which cannot satisfy their affirmative *evidentiary* burden. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 888 (1990); see Pet. App. 158a-159a (Raggi, J., dissenting). Because respondents' speculation that they would be incidentally subject to future surveillance was insufficient, the government had no obligation to present evidence in rebuttal.

For instance, respondents assert (Br. 20-21, 24) that they established that "their communications were *likely* to be monitored under [Section 1881a]." The court of appeals, in turn, stated that "[respondents] testify" that they communicate with the "sorts of individuals that the government will most likely seek to monitor" and that the government did not "dispute[] that assertion." Pet. App. 37a. No such evidentiary proffer by the government was necessary, because respondents' submission simply showed that they "*believe* that at least some of [their] international communications are likely to be collected," *id.* at 337a (emphasis added); accord *id.* at 343a-

344a, 350a, 356a-357a, 366a, 370a. That belief is wholly speculative and unsupported by specific facts.[1]

Respondents relatedly contend (*e.g.*, Br. 1, 7, 33) that Section 1881a authorizes what they call "dragnet" surveillance—the acquisition of communications content without even an Executive-Branch finding of individualized suspicion to limit surveillance targets—which, respondents assert, could include the acquisition of "all communications to and from specific countries" that would capture the communications of "thousands or even millions of U.S. citizens and residents." Respondents offer no facts supporting that speculation. They simply state in their declarations that their "understanding" is that such "dragnet" surveillance would occur under Section 1881a. See, *e.g.*, Pet. App. 336a-337a, 356a, 365a, 370a, 374a.

Respondents' speculative position, moreover, is internally inconsistent. Respondents assert (Br. 9) that the type of unfocused surveillance they "understand" could be conducted would violate the Fourth Amendment. See also Dist. Ct. Doc. 21, at 5, 20 & n.10, 28. But Section 1881a expressly provides that its authorization extends only to surveillance conducted "consistent with the [F]ourth [A]mendment," 50 U.S.C. 1881a(b)(5), and specifically requires the Foreign Intelligence Surveillance Court to ensure that the government's targeting

---

[1] Respondents' related contention that the government "conceded" that Section 1881a "plainly authorizes the acquisition of [*respondents'*] international communications" is misleading. Br. 20, 24 (emphasis added). The government acknowledged that it might incidentally collect certain communications of U.S. persons if they communicate with a third party overseas targeted for Section 1881a surveillance, but respondents have proffered no evidence that they communicate with persons actually targeted under Section 1881a.

procedures comply with the Fourth Amendment, 50 U.S.C. 1881a(i)(3)(A). In other words, under respondents' view of the Fourth Amendment, Section 1881a *could not* authorize the very type of surveillance activity that respondents nevertheless speculate—without evidence—would be undertaken under the authority of Section 1881a.

That self-contradictory conjecture underscores the court of appeals' error. Allowing this case to proceed based on a litigant's speculative "beliefs"—unsupported by specific facts establishing an imminent injury in fact—wholly disregards this Court's longstanding requirement of a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action," and effectively requires federal courts to resolve important legal questions in the abstract and "rarified atmosphere of a debating society." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). That error is particularly acute here, where a federal court must exercise its most important and delicate responsibility: constitutional review of the actions of co-equal Branches of Government. Pet. 33.

b. *Present injury.* Respondents alternatively argue (Br. 16-23), that they suffer a "present injury" because "they have taken costly and burdensome measures to protect their sensitive communications from interception," Br. 16. They contend (Br. 21-23) that this self-imposed injury establishes standing, because if the government's "conduct" puts a plaintiff to the "choice" of suffering an injury from that conduct or taking "costly and burdensome measures" to avoid that injury, the latter, self-imposed measures are a cognizable Article III injury, Br. 21. That is incorrect. The Article III injury

(if any) in such contexts must be an "imminent" future injury from the government's actions, not a present injury from the plaintiff's own conduct. Respondents, as explained above, have not established any "imminent" and allegedly harmful government conduct—namely, Section 1881a-authorized acquisition of their communications. Any contrary rule would improperly treat similarly situated plaintiffs differently by allowing plaintiffs to manufacture standing for, as here, the price of a plane ticket. Pet. 23.

Respondents rely (Br. 21-23) on *Meese* v. *Keene*, 481 U.S. 465 (1987); *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000); and *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) *(SCRAP)*. But none of those cases found standing based on a plaintiff's self-imposed injury. *Keene* and *Laidlaw* both involved *proven conduct* by the defendant that itself caused (or threatened imminent) injury to the plaintiff. Pet. 25. *SCRAP* similarly based standing on the allegation that individuals' ongoing recreational *use* of natural resources would be less enjoyable. 412 U.S. at 678, 685, 688. The "asserted injury" thus was that "specific and perceptible harms—depletion of natural resources and increased littering—would befall [the plaintiff's] members imminently if the [agency] orders were not reversed." *Whitmore* v. *Arkansas*, 495 U.S. 149, 159 (1990) (discussing *SCRAP*).

The fact that respondents' decision to incur self-inflicted injuries flows from the asserted chilling effect of their "fear" of possible surveillance adds nothing to the analysis. Pet. 23-25. Respondents attempt (Br. 17-19) to distinguish *Laird* v. *Tatum*, 408 U.S. 1 (1972), on the grounds that the *Laird* plaintiffs' activities were not

"chilled" and that those plaintiffs suffered no "specific present objective harms." Neither ground withstands scrutiny. Although *Laird* noted "considerable doubt" whether the plaintiffs' activities were in fact chilled, *id.* at 13 n.7, it did not rest its decision on that observation. The "alleged 'chilling' effect" from the plaintiffs' fear of future harm, the Court held, was a "subjective 'chill'" that is "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14. Respondents have no meaningful explanation for their assertion that a self-imposed expenditure of funds because of a similar fear constitutes an Article III injury, but the self-imposed cessation of constitutionally protected activity does not.[2]

2. Review is warranted because the decision below directly conflicts with *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.), and *ACLU* v. *NSA*, 493 F.3d 644 (6th Cir. 2007), cert. denied, 552 U.S. 1179 (2008). See Pet. 27-31. Respondents' contrary contentions (Br. 33-35) are unavailing. Indeed, respondents do not meaningfully attempt to distinguish the legal holdings in those cases and instead focus on factual distinctions that have no bearing on the analysis.

---

[2] Respondents contend (Br. 26-28) that the courts have no meaningful role under the government's understanding of Article III standing. That contention is misplaced. The fact that respondents' own speculation about a possible future injury cannot establish a non-conjectural, imminent injury does not suggest that no one has had or could have standing to challenge Section 1881a surveillance. See Pet. 6-7 & n.5. In any event, it is well settled that the "assumption that * * * no one would have standing" is "not a reason to find standing." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

The assertion (Br. 35) that respondents' challenge to "a specific federal statute" is different than the challenge to the Executive Order in *United Presbyterian Church* may be true, but it is irrelevant here. The point is that each "merely *authorizes*" certain intelligence-gathering activities and does "not *direct* [such activities] against all persons." 738 F.2d at 1380. Respondents' speculation (like that of the plaintiffs in *United Presbyterian Church*) that they are "especially likely to be [subjected to] the [purportedly] unlawful activities authorized" is insufficient to show any "imminen[t]" future injury. *Ibid.* *United Presbyterian Church* also explains that, under *Laird*, a self-imposed harm from a "chilling effect" is insufficient. *Id.* at 1378-1379. Even the court of appeals here agreed that *United Presbyterian Church* (like *ACLU*) reads "*Laird* essentially the same way [as] the government," but it then expressly rejected that analysis. Pet. App. 59a. Finally, respondents' contention (Br. 35) that the existence of Section 1881a has "compelled" them to take actions that injure them is no better than the claims that *United Presbyterian Church* rejected. See Pet. 28.

Respondents' effort (Br. 33-34) to distinguish *ACLU* is equally unavailing. Like respondents, the plaintiffs in *ACLU* asserted self-imposed injuries incurred to avoid the interception of their communications that they claimed to reasonably fear. The Sixth Circuit rejected that assertion as a basis for standing, because the plaintiffs presented no non-speculative evidence of such surveillance. Pet. 29-30 & n.9. Respondents argue (Br. 33) that the "crucial" difference is that the Terrorist Surveillance Program (TSP) challenged in *ACLU* involved targeted surveillance whereas Section 1881a, according to respondents, authorizes a type of "dragnet surveil-

lance" that they believe makes their communications more "likely to be intercepted." That contention, however, is just as speculative as the contention in *ACLU* because respondents present no evidence regarding *actual* surveillance.

Respondents' remaining contentions are also unpersuasive. In *ACLU*, the state-secrets privilege prevented the plaintiffs' discovery of information about the government's actual intelligence operations and targets. The Sixth Circuit then concluded that the plaintiffs' speculative evidence was insufficient. 493 F.3d at 650 & n.3, 653 (Batchelder, J.); *id.* at 692 (Gibbons, J.); see Pet. 29-30. Respondents fail to establish their standing for the same reason: They failed to carry their summary-judgment burden of providing non-speculative evidence of surveillance activity that would imminently intercept their communications. Finally, the fact that the TSP was a "surveillance program" whereas Section 1881a is a "public law" (Br. 34) has no material effect on the analysis. In both cases, Article III standing was and is lacking because the plaintiffs failed to proffer evidence establishing an "imminent" injury in fact.

3. Respondents' contention (Br. 28-33) that review should be deferred is unpersuasive. As in *Laird*, the important Article III question now presented warrants review at the threshold to safeguard the constitutional separation of powers in this critical national-security context. Pet. 32-34. No judge on the equally divided court of appeals that denied rehearing en banc questioned that question's exceptional importance, and five specifically suggested that this Court grant review. Pet. 32. Moreover, the assertion (Br. 29) that the record in this case contains "concrete facts" on which judicial review of an Act of Congress could proceed is illusory.

Although respondents' evidence provides speculation about government surveillance purportedly authorized by Section 1881a, it provides no specific facts upon which such merits review might properly rest. See pp. 4-5, *supra*.

Nor is the need for review diminished by the December 31, 2012, sunset date for Title VII of FISA. National-security legislation enacted after the attacks of September 11, 2001, has often included sunset dates that Congress has repeatedly extended. See, *e.g.*, PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, § 2, 125 Stat. 216 (four-year extensions for multiple statutes); USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 102-104, 120 Stat. 194-195 (repealing sunset dates for various provisions and extending others). The government's use of its Title VII authority "continues to produce significant intelligence that is vital to protect the nation," and "[r]eauthorizing this authority is the top legislative priority of the Intelligence Community." Letter from Director of National Intelligence James R. Clapper and Attorney General Eric H. Holder to Speaker John Boehner, Majority Leader Harry Reid, Minority Leader Nancy Pelosi, and Minority Leader Mitch McConnell 1-2 (Feb. 8, 2012), http://www.dni.gov/electronic_reading_room/dni_ag_letter.pdf. The Administration therefore is working with Congress to "reauthoriz[e] Title VII, without amendment." *Id.* at 2; see Letter from Director of National Intelligence James R. Clapper to Speaker John Boehner, Majority Leader Harry Reid, Minority Leader Nancy Pelosi, and Minority Leader Mitch McConnell (Mar. 26, 2012), http://www.dni.gov/electronic_reading_room/dni%20letter%20with%20

fisa%20amendments.pdf (transmitting government's proposed four-year-extension legislation).

Even if Congress were to modify Title VII or permit its expiration in 2013, the Article III question presented would warrant review at this time. The logic of the court of appeals' unprecedented holding, which directly conflicts with decisions of other courts of appeals in analogous contexts, does not turn on statutory details. Moreover, the potential application of the Second Circuit's holding is expansive. If respondents' own speculative assessment that they are "likely" to be affected by intelligence activity targeting persons overseas established Article III standing, persons or entities that present equally speculative claims that they are likely *targets* of the United States' foreign-intelligence activities could bring suit within the Second Circuit to adjudicate the lawfulness of those purported activities. Others could similarly manufacture Article III standing where none otherwise would exist, simply by sustaining a self-inflicted injury. Before the federal courts are forced to feel their way into that uncharted territory, and before Article III power is exercised to resolve respondents' constitutional challenge to vitally important national-security legislation, this Court should grant review at this critical juncture of this case.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MAY 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1025

IN THE

Supreme Court of the United States

JAMES R. CLAPPER, JR.,
Director of National Intelligence, *et al.*,
Petitioners,

v.

AMNESTY INTERNATIONAL USA, *et al*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF WILLIAM P. BARR, EDWIN MEESE III, DICK THORNBURGH, AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Date: March 19, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

QUESTIONS PRESENTED

Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a, allows the Attorney General and Director of National Intelligence to authorize jointly the "targeting of [non-United States] persons reasonably believed to be located outside the United States" to acquire "foreign intelligence information," normally with the Foreign Intelligence Surveillance Court's prior approval of targeting and other procedures. Respondents are United States persons who are not permissible surveillance targets under Section 1881a. Respondents filed this action on the day that Section 1881a was enacted in 2008, seeking both a declaration that Section 1881a is unconstitutional and an injunction permanently enjoining any foreign-intelligence surveillance from being conducted under Section 1881a. The question presented is:

Whether Respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a-authorized surveillance and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS SHARPLY WITH THIS COURT'S STANDING CASE LAW 11

II. REVIEW IS WARRANTED IN VIEW OF THE NEED FOR CAUTION BEFORE COURTS AGREE TO HEAR THE MERITS OF CASES RAISING SENSITIVE NATIONAL SECURITY ISSUES 16

III. REVIEW IS WARRANTED BECAUSE THE SECOND CIRCUIT FAILED TO ARTICULATE THE NATURE AND SOURCE OF THE CONSTITUTIONAL CLAIMS IT IS ALLOWING RESPONDENTS TO PURSUE 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases:

ACLU v. NSA,
493 F.3d 644 (6th Cir. 2007),
cert. denied, 552 U.S. 1179 (2008) 2, 7, 9
Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436 (2011) 15
City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 14
Ex parte McCardle,
74 U.S. (7 Wall.) 506 (1869) 9
Laird v. Tatum,
408 U.S. 1 (1972) 14, 15
Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 9, 12, 13
Tenet v. Doe,
544 U.S. 1 (2005) 17
United Presbyterian Church v. Reagan,
738 F.2d 1375 (D.C. Cir. 1984) 7, 9, 13
United States v. Reynolds,
345 U.S. 1 17
United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 19
Whitmore v. Arkansas,
495 U.S. 149 (1990) 11

Statutes and Constitutional Provisions:

U.S. Const., Art. III ..... *passim*

U.S. Const., Art. III, § 2 11

Page(s)

U.S. Const., amend. i 5

U.S. Const., amend. iv 5, 8, 19, 20

FISA Amendments Act of 2008 ("FAA"), Pub. L. No. 110-261 ..... 4, 6

Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 50 U.S.C. §§ 1801 *et seq.* 3

50 U.S.C. § 1801(f) 32
50 U.S.C. § 1803 2
50 U.S.C. § 1804 3
50 U.S.C. § 1805 3
50 U.S.C. § 1881a ..... *passim*
50 U.S.C. § 1881a(b)(1) & (4) 19
50 U.S.C. § 1881a(b)(5) 19
50 U.S.C. § 1881a(g)(2)(A) 5

Miscellaneous:

Executive Order No. 12,333, § 2.2, 3 C.F.R. § 200 .. 3

Office of the Attorney General, "Policies and Procedures Governing Invocation of the State Secrets Privilege" (Sept. 29, 2009) 17

INTERESTS OF *AMICI CURIAE*

The *amici curiae* are three former Attorneys General of the United States and a public interest law firm.[1] They believe that a federal court should consider constitutional challenges to federal legislation only after fully satisfying itself that the plaintiffs possess Article III standing to raise their challenges.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counsellor to President Ronald Reagan from 1981 to 1985.

The Honorable Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

all 50 States. WLF has frequently appeared in this and other federal courts to urge courts to confine themselves to deciding cases that fall within their jurisdiction as set forth in Article III of the U.S. Constitution. *See, e.g., Boumediene v. Bush,* 553 U.S. 723 (2008); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008); *Al-Haramain Islamic Found. v. Obama*, No. 11-15468 (9th Cir., dec. pending).

The Executive and Legislative Branches have determined that the electronic surveillance authorized by 50 U.S.C. § 1881a is an important tool in maintaining America's national security. The program allows the Attorney General and the Director of National Intelligence – with the approval of the Foreign Intelligence Surveillance Court – to authorize the electronic surveillance of foreigners believed to be located outside the United States, for the purpose of obtaining foreign-intelligence information. Although § 1881a contains numerous provisions designed to ensure that constitutional rights are respected, Respondents contend that those provisions do not go far enough, and are asking the federal courts to strike down the statute. However, because Respondents are U.S. citizens, they may not be targeted under the statute, and they have produced no evidence that any of their communications have been intercepted. *Amici* are concerned that the federal courts not pass judgment on the constitutionality of federal legislation when the plaintiffs, as is true here, cannot demonstrate that they have suffered an injury directly traceable to the legislation they challenge. *Amici* believe that courts should be particularly reluctant to hear such challenges when, as here, the legislation at issue has been deemed

vital to the national defense by the other branches of government and any airing of the relevant facts in a federal courtroom poses risks to national security.

STATEMENT OF THE CASE

For national security reasons, the United States government has long engaged in significant amounts of surveillance activity outside the United States. Since 1978, a portion of that surveillance – "electronic surveillance" – has been subject to congressional regulation pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 50 U.S.C. §§ 1801 *et seq.*[2] Overseas surveillance not covered by FISA is governed by Executive Order No. 12,333, § 2.2, 3 C.F.R. § 200.

FISA established procedures whereby the Attorney General and other federal officials could obtain authorization from the Foreign Intelligence Surveillance Court (FISC) to engage in regulated "electronic surveillance" for national security purposes. 50 U.S.C. §§ 1803, 1804. FISC judges grant *ex parte* approval to surveillance applications for a specified time period if they determine that federal officials have met the prerequisites set forth in FISA. 50 U.S.C. § 1805.

Congress amended FISA in 2008 by adopting the

---

[2] FISA's definition of "electronic surveillance" is relatively narrow as applied to overseas activities. It does not, for example, include acquiring a wire or radio communication of a U.S. citizen who is outside the United States unless the communication is to or from a "person in the United States" and the "acquisition occurs in the United States." 50 U.S.C. § 1801(f).

FISA Amendments Act of 2008 (FAA), Pub. L. No. 110-261. Among other things, the FAA added Section 702 to FISA, 50 U.S.C. § 1881a, to establish a supplemental procedure for obtaining authorization to engage in overseas electronic surveillance. Most importantly for purposes of this case, § 1881a does not permit the Executive Branch to "target a United States person," regardless where that person is located, or a non-United States person located in the United States.

Section 1881a is designed to permit surveillance of non-United States persons when the acquisition involves obtaining foreign-intelligence information from or with the assistance of an electronic service provider. Except in limited "exigent circumstances," § 1881a authorizes surveillance only after a FISC court has approved the targeting and "minimization" procedures to be employed and has approved a certification from the Attorney General and the Director of National Intelligence that:

- the acquisition of information does not violate the Fourth Amendment;

- the acquisition involves obtaining "foreign intelligence information" from an electronic service provider;

- the targeting procedures are reasonably designed to ensure that the acquisition targets only individuals who are reasonably believed to be outside the United States; and

- the minimization procedures are designed to

limit access to information about U.S. persons.

50 U.S.C. § 1881a(g)(2)(A).

On the day of § 1881a's enactment in 2008, Respondents filed this lawsuit challenging its constitutionality. Pet. App. 197a-242a. They seek declaratory relief and a permanent injunction against the conduct of surveillance pursuant to the authority granted by § 1881a. They allege that § 1881a violates the First and Fourth Amendments as well as separation-of-powers principles. Named as defendants in their official capacities are the three Petitioners: Director of National Intelligence James R. Clapper, Director of the National Security Agency Keith B. Alexander, and Attorney General Eric H. Holder, Jr.

Petitioners (collectively, "the Government") filed a motion for summary judgment, claiming that Respondents (four attorneys and five organizations) lacked Article III standing to challenge the facial validity of § 1881a. In support of their standing claims, Respondents stated that their work requires them to communicate regularly with overseas individuals, some of whom the Government believes to be associated with terrorist organization. They claimed that because of that belief, and because many of the overseas individuals are located in areas that are a focus of the Government's counterterrorism efforts, their electronic communications with those individuals are likely to be acquired by the Government pursuant to § 1881a. Their claimed injuries fell into two categories: (1) "an actual and well-founded fear" of future surveillance of their communications with overseas individuals; and (2) the

cost of measures designed to minimize the likelihood of such surveillance (such as traveling overseas to speak with the overseas individuals, rather than communicating with them by wire).

The district court determined that Respondents lacked Article III standing and granted summary judgment to the Government. Pet. App. 62a-113a. It determined that Respondents' fear-of-surveillance injury was too speculative to constitute injury-in-fact because "a surveillance order from the FISC . . . cannot target the plaintiffs and whether an order will be sought that affects the plaintiffs' rights, and whether such an order would be granted by the FISC, is completely speculative." *Id.* at 85a. The court also held that the costly measures undertaken by Respondents to protect the privacy of their communications did not constitute injury-in-fact because those costs flowed from Respondents' "purely subjective fear of surveillance," not from evidence that the overseas individuals with whom they communicate will, in fact, be targeted under § 1881a. *Id.* at 101a.

The Second Circuit reversed the district court's judgment and reinstated the lawsuit. Pet. App. 1a-61a. It held that both of Respondents' claimed injuries (their fear of future surveillance and their expenditures to minimize the chances of surveillance) were sufficient to satisfy Article III standing requirements. The appeals court held that Respondents' expenditures were "fairly traceable" to the FAA because their fears that the government would intercept their communications under the FAA were "reasonable" and it thus was "reasonable" for them to expend funds to prevent the

interceptions. *Id.* at 27a-28a. Among the factors that led the court to conclude that future surveillance of Respondents is "reasonably" likely: (1) the FAA authorizes surveillance of non-United States persons located overseas, a group with which Respondents communicate regularly, *id.* at 36a; (2) it is "fanciful" to suggest that the Government will not exercise its new surveillance authority, given statements by federal officials that authorizing such surveillance is "necessary to protect[ ] the nation against attack," *id.* at 37a; and (3) Respondents' belief that those with whom they communicate will be targeted for surveillance is "reasonable," given the location of those individuals and the Government's belief that they are associated with terrorist organizations. *Id.*

The court said its conclusion was unaffected by the fact that the FAA does not authorize the Government to target Respondents directly (because they are U.S. citizens). It stated that so long as Respondents can demonstrate that they reasonably fear that the Government's targeting of others will result in the surveillance of their communications, they are not precluded from demonstrating Article III standing simply because the Government did not set out to target them. *Id.* at 41a-50a. The court rejected the Government's reliance on two decisions from other federal appeals courts – *ACLU v. NSA* and *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) – stating that "those cases do not bind us" and are "factually distinguishable from the instant case" and that it "d[id] not find their interpretation" of this Court's standing case law "to be persuasive." *Id.* at 58a-59a.

The appeals court denied the Government's petition for rehearing *en banc* by an equally-divided, 6-6 vote. Pet. App. 114a-115a. Four judges authored opinions dissenting from denial of the petition. The principal dissent – authored by Judge Raggi and joined by four other judges, *id.* at 133a- 175a – stated that the panel decision was "at odds" with Supreme Court precedent holding that "a subjective fear of challenged government conduct is insufficient to support standing." *Id.* at 133a-134a. Judge Raggi stated that the panel's decision was particularly unwarranted because "the nature and source" of the Fourth Amendment rights being asserted by Respondents was so unclear. *Id.* at 138. Noting that Respondents do not assert that they might be the target of surveillance under the FAA and that they are not permitted to assert the Fourth Amendment rights of others who *are* targeted, she questioned how "the panel could recognize [Respondents'] standing without a clearer comprehension of the personal Fourth Amendment rights at stake." *Id.* at 144a.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Respondents seek invalidation of a significant national security statute designed to protect the Nation from terrorist activity. Before they decide any case – and certainly before they decide a case in which important national security concerns are at stake – federal courts are under a duty to ensure that they possess Article III jurisdiction over the claims being asserted. As this Court has repeatedly explained:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

The Second Circuit held that Respondents possess Article III standing to challenge § 1881a even though they concede that they have no evidence that the Government has ever acquired, or is planning to acquire, any of their electronic communications pursuant to that statute. Indeed, they concede that, due to their U.S. citizenship, the law prohibits the Government from targeting them for surveillance. The appeals court held that Respondents had demonstrated injury-in-fact that was directly traceable to § 1881a because: (1) their fears that the Government would intercept their communications were "reasonable"; and (2) they acted reasonably in spending money to order to minimize the likelihood of such interception. As the Petition fully explains, and as the Second Circuit essentially concedes, Pet. App. at 59a, the decision below is in direct conflict with decisions from the Sixth and D.C. Circuits regarding what is required to establish standing to challenge government surveillance programs. Review is warranted to resolve that conflict.

Amici will not repeat the Petition's analysis regarding why the decision below cannot be reconciled with the decisions of the Sixth Circuit (*ACLU v. NSA*)

and the D.C. Circuit (*United Presbyterian Church*). We write separately to focus on several other reasons why review is particularly appropriate. First, the decision below conflicts sharply with this Court's standing decisions. In particular, this Court has repeatedly rejected claims that a "reasonable" fear of future injury can satisfy Article III's injury-in-fact requirement. Rather, the Court has made clear that future injury can provide the requisite injury-in-fact only when its threat is "imminent." Nor can a plaintiff create his own injury-in-fact by expending funds to prevent future injury in the absence of such an imminent threat.

Second, review is warranted because federal courts should be especially cautious about permitting national security cases of this sort to proceed to trial in the absence of clear evidence that the plaintiffs possess standing. A trial in this case would undoubtedly require the Government to reveal significant information about the manner in which it is implementing the surveillance authority granted to it by § 1881a. Disclosure of such information could prove valuable for enemies of the United States who seek to prevent their electronic communications from being intercepted. The Executive Branch is understandably reluctant to short-circuit litigation by asserting the state secrets privilege unless such an assertion is absolutely necessary, and it has not done so in this case. But the absence of such an assertion in this case should not blind the Court to the potential damage to national security that a trial of this case might entail. Given that potential, it is particularly important for the Court to heed the Government's request for review of the extremely generous standing rules invoked by the Second Circuit as its basis for

upholding Respondents' Article III standing.

Finally, review is warranted because, as Judge Raggi pointed out in her dissent from denial of rehearing *en banc*, the nature and source of the constitutional rights that Respondents assert are so unclear. Pet. App. 138a. Without a clearer understanding of the Fourth Amendment rights allegedly at stake, "it is impossible to conclude that these plaintiffs are the persons best suited to challenge the constitutionality of a statute that cannot target them." *Id.* at 144a. While such prudential considerations do not necessarily affect Respondents' Article III standing, those considerations do provide additional grounds to question the Second Circuit's singular decision to grant Article III standing to parties that have shown nothing more than that their fears of future injury are "reasonable."

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS SHARPLY WITH THIS COURT'S STANDING CASE LAW

Article III, § 2 of the Constitution extends the "judicial Power" of the United States only to "Cases" and "Controversies." Standing to sue is part of the common understanding of what it takes to make a justiciable case. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Review is warranted because the Second Circuit upheld Respondents' standing by applying legal standards that conflict sharply with those traditionally employed by this Court.

The Supreme Court has explained Article III standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. . . . First, and foremost, there must be alleged (and ultimately proven) an "injury in fact" – a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" . . . Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . . . And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-103 (1998) (citations omitted).

The Second Circuit held that both of the Respondents' claimed injuries (their fear of future surveillance and their expenditures to minimize the chances of surveillance) were sufficient to satisfy Article III standing requirements. It held that a fear of future surveillance pursuant to § 1881a is sufficient to establish Article III standing so long as the fear is "reasonable." Pet. App. 30a.[3]

---

[3] The appeals court ultimately concluded that Respondents' fear of future surveillance was sufficiently reasonable to constitute Article III injury-in-fact because: (1) Respondents regularly communicate with non-United States persons living overseas, and § 1881a authorizes surveillance of such individuals; (2) the Government is likely to exercise its new surveillance activity; and (3) it is reasonable to believe that the overseas individuals with

That holding sharply conflicts with this Court's far more stringent standard regarding when anticipated future injury can be sufficient to establish Article III standing. The Court has explained that injury-in-fact requires a harm that is "concrete and actual and imminent, not conjectural or hypothetical." *Steel Co.*, 523 U.S. at 102-03. Even if, as the Second Circuit concluded, it was "reasonable" for Respondents to conclude that they will be subjected to surveillance pursuant to § 1881a, that is a far cry from a finding that such surveillance is "imminent."

Respondents are asserting, of course, not merely that they will be injured in the future when they are

---

whom Respondents communicate will be targeted under § 1881a, given their location and the Government's belief that they are (or were) associated with terrorist groups. *Id.* at 36a-37a. The appeals court's factual conclusion are open to serious question. First, as then-Judge Scalia concluded in his D.C. Circuit opinion in *United Presbyterian Church*, in a suit seeking to enjoin government action that allegedly would cause injury, the likelihood of future injury is significantly heightened when the challenged exercise of governmental power is "regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *United Presbyterian Church*, 738 F.2d at 1378. When, as was true in that case and is also true here, the challenged rule merely authorizes but does not command the government to take action, a plaintiffs' ability establish injury-in-fact by demonstrating the likelihood of future injury is considerably reduced. Second, in the absence of any evidence regarding how the Executive Branch is actually administering § 1881a, there is no basis for concluding that, among the billions of individuals worldwide who are eligible to be targeted under § 1881a, the Executive Branch is likely to focus on the very overseas individuals with whom Respondents regularly correspond.

subjected to surveillance, but also that their fear of future surveillance is a present-day injury. But the Supreme Court case principally relied on by the Second Circuit regarding fear of future injury – *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) – cuts strongly against the Second Circuit's position. *Lyons* held that a plaintiff's fear of police misconduct is not enough to demonstrate that the threat is sufficiently "actual and imminent" to constitute injury-in-fact. *Id.* at 107. The Court explained, "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Id.* at 107 n.8 (emphasis added). The plaintiff in *Lyons* was denied standing because the Court determined that the feared future injury (the recurrence of an episode in which Los Angeles police placed him in a choke hold) was not sufficiently imminent. Respondents, who (unlike Lyons) have not alleged that they ever previously were subjected to unconstitutional government actions, have similarly failed to demonstrate that their fear of future surveillance is based on imminent government conduct.

The decision below also conflicts with this Court's decision in *Laird v. Tatum*, 408 U.S. 1 (1972). *Laird* held that the present-day effects on a plaintiff caused by his fear that he will be subjected to government surveillance in the future (in that case, an alleged "chilling effect" on the exercise of a plaintiffs' First Amendment rights) are insufficient to satisfy Article III standing requirements. *Id.* at 13-14. The panel's efforts to distinguish *Laird*, Pet. App. 56a-58a, are unavailing. The panel may be correct that the plaintiffs in *Laird* presented significantly weaker evidence than did Respondents regarding the likelihood of future injury,

but that observation does nothing to eliminate the conflict between *Laird* and the decision below regarding whether the effects on a plaintiff caused by his fear that he will be subjected to government surveillance are sufficient to establish injury-in-fact.

The decision below also conflicts with this Court's decisions, in finding that Respondent's expenditure of funds to reduce the likelihood of surveillance constituted injury-in-fact fairly traceable to § 1881a. The panel held that those expenditures were sufficient to meet Article III standing requirements because Respondents' fears that the Government would intercept their communications under § 1881a were "reasonable" and it thus was "reasonable" for them to expend funds to prevent the interceptions. *Id.* at 27a-28a.

But this Court has repeatedly held that an injury is insufficient to establish Article III standing if it is not "fairly traceable to the challenged action of the defendant." *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1442 (2011). Any claim that Respondents' expenditures were "fairly traceable" to § 1881a is highly problematic, given that the expenditures were designed to prevent a future injury that was neither "actual" nor "imminent." As Judge Raggi observed, if the panel were correct that expenditures designed to address a non-imminent future injury are sufficient to meet Article III standing requirements, then "for the price of a plane ticket, plaintiffs can transform their standing burden from one requiring a showing of actual or imminent FAA interception to one requiring a showing that their

subjective fear of such interception is not 'fanciful,' 'irrational,' or 'clearly unreasonable.'" Pet. App. 148a (Raggi, J., dissenting from denial of rehearing *en banc*). She added, "On that theory, every mobster's girlfriend who pays for a cab to meet with him in person rather than converse by telephone would be acting on a not-irrational fear of Title III interception and, therefore, have standing to challenge that statute." *Id.* at 133a. This Court has never countenanced such efforts by plaintiffs to bootstrap themselves into Article III standing.

In sum, review is warranted to resolve the considerable conflict between the Second Circuit's decision and this Court's case law addressing standing.

II. REVIEW IS WARRANTED IN VIEW OF THE NEED FOR CAUTION BEFORE COURTS AGREE TO HEAR THE MERITS OF CASES RAISING SENSITIVE NATIONAL SECURITY ISSUES

Review is also warranted because federal courts should be especially cautious about permitting national security cases of this sort to proceed to trial in the absence of clear evidence that the plaintiffs possess standing. The individual *amici*, while heading the Justice Department, were directly involved in the preparation of applications to the FISC for authority to engage in electronic surveillance for national security purposes. They are keenly aware of the highly sensitive nature of information contained in those applications. Because Respondents' suit challenges the constitutionality of § 1881a based on their assessment of how the

surveillance authorized by § 1881a is likely to be operated, any trial of Respondents' claims risks disclosure of sensitive information regarding those operations. In light of those concerns, prudence dictates that review be granted to ensure that this matter is not permitted to proceed to trial unless it is absolutely certain that Respondents can meet the Article III standing requirements.

Amici recognize that the Government could address such national security concerns by invoking the state secrets doctrine to prevent sensitive information from being introduced at trial, or even (in appropriate cases) to require dismissal of the lawsuit. *See United States v. Reynolds*, 345 U.S. 1 (1953); *Tenet v. Doe*, 544 U.S. 1 (2005). The Executive Branch, however, is understandably reluctant to invoke the state secrets privilege more often than absolutely necessary. *See* Office of the Attorney General, "Policies and Procedures Governing Invocation of the State Secrets Privilege" (Sept. 29, 2009) ("The Department is adopting these policies and procedures to strengthen public confidence that the U.S. government will invoke the privilege in court only when genuine and specific harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests.") The Justice Department's decision not to invoke the state secrets privilege thus far in this lawsuit may reflect a determination that invocation is unnecessary in light of Respondents' clear lack of standing to press their claims. The Second Circuit's decision upholding Respondents' standing may nonetheless force the Attorney General belatedly to invoke the state secrets privilege in order to eliminate the potential for harm to

national defense or foreign relations. Review is warranted to ascertain whether such invocation can be avoided. Invocation of the privilege would, of course, be unnecessary if, as the Government contends, the suit should be dismissed because Respondents lack Article III standing.

The Government's decision to date not to assert the state secrets privilege should not blind the Court to the potential damages to national security that a trial of this case might entail. A trial in this case would undoubtedly require the Government to reveal significant information about the manner in which it is implementing the surveillance authority granted to it by § 1881a. Disclosure of such information could prove valuable for enemies of the United States who seek to prevent their electronic communications from being intercepted. Review is warranted to ensure that the Nation will not be required to bear the costs of such disclosures unless this Court is satisfied that Respondents have satisfied the Article III standing requirements.

III. REVIEW IS WARRANTED BECAUSE THE SECOND CIRCUIT FAILED TO ARTICULATE THE NATURE AND SOURCE OF THE CONSTITUTIONAL CLAIMS IT IS ALLOWING RESPONDENTS TO PURSUE

Review is also warranted because the nature and source of the constitutional rights that Respondents assert are so unclear. *Amici* respectfully suggest that it would be highly imprudent for the federal courts to

continue to exercise jurisdiction over this matter unless the nature of Respondents' claims are more clearly defined.

The heart of Respondents' claim is that § 1881a violates the Fourth Amendment. Surprisingly, the Second Circuit failed to explain its views regarding the nature of Respondents' Fourth Amendment claims – and thus failed to ascertain whether Respondents were proper plaintiffs to be pursuing claims of that nature.

The Fourth Amendment protects against "unreasonable searches and seizures" of one's person, house, papers, and effects. Given the FAA's explicit admonition that no electronic surveillance may be conducted pursuant to the FAA unless it complies with the Fourth Amendment, § 1881a(b)(5), the peculiar nature of Respondents' claim – that § 1881a is facially invalid under the Fourth Amendment – is readily apparent.

Importantly, Respondents – who are all U.S. citizens – are not themselves the targets of the statute they seek to invalidate. *See* § 1881a(b)(1) & (4) (prohibiting targeting of all U.S. persons, and of all people known to be living in the United States). If their electronic communications are ever acquired by the United States, it will be because, by coincidence, they were communicating with a non-U.S. person who was the actual target of § 1881a surveillance. But as Judge Raggi points out, Pet. App. 142a, courts have generally understood the Fourth Amendment as requiring the officials seeking a warrant to establish probable cause only with respect to the target of their investigation, not

with respect to others who may communicate with the target. So this lawsuit cannot be based on a claim that the Government violated Respondents' Fourth Amendment rights by acquiring their electronic communications without first establishing probable cause to conduct a search.

On the other hand, non-United States persons – the only permissible targets of § 1881a surveillance – lack any rights under the Fourth Amendment by virtue of their non-resident alien status. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990). Accordingly, Respondents cannot claim to be acting on behalf of their overseas correspondents and asserting the latter's Fourth Amendment rights.

The decision below does nothing to clear up the nature of the Fourth Amendment claims being asserted by Respondents. But until the nature of those claims is made clear, "it is impossible to conclude that these plaintiffs are the persons best suited to challenge the constitutionality of a statute that cannot target them." *Id.* at 144a. While such prudential considerations do not necessarily affect Respondents' Article III standing, those considerations do provide additional grounds to question the Second Circuit's singular decision to grant Article III standing to parties that have shown nothing more than that their fears of future injury are "reasonable."

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Richard A. Samp
Washington Legal Found.
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: March 19, 2012

PETITIONER'S BRIEF

No. 11-1025

In the Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

STUART F. DELERY
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

DOUGLAS N. LETTER
THOMAS M. BONDY
DANIEL J. LENERZ
HENRY C. WHITAKER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ROBERT S. LITT
General Counsel

TRICIA S. WELLMAN
Deputy General Counsel

BRADLEY A. BROOKER
Associate General Counsel
Office of the Director of National Intelligence
Washington, D.C. 20511

RAJESH DE
General Counsel

ARIANE E. CERLENKO
Associate General Counsel
National Security Agency
Ft. Meade, Md. 20755

QUESTION PRESENTED

Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1881a (Supp. II 2008)—referred to here as Section 1881a—allows the Attorney General and Director of National Intelligence to authorize jointly the "targeting of [non-United States] persons reasonably believed to be located outside the United States" to acquire "foreign intelligence information," normally with the Foreign Intelligence Surveillance Court's prior approval of targeting and other procedures. 50 U.S.C. 1881a(a), (b), (g)(2) and (i)(3); cf. 50 U.S.C. 1881a(c)(2). Respondents are United States persons who may not be targeted for surveillance under Section 1881a. Respondents filed this action on the day that Section 1881a was enacted, seeking both a declaration that Section 1881a is unconstitutional and an injunction permanently enjoining any foreign-intelligence surveillance from being conducted under Section 1881a. The question presented is:

Whether respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a-authorized surveillance and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.

PARTIES TO THE PROCEEDING

Petitioners are James R. Clapper, Jr., in his official capacity as Director of National Intelligence; General Keith B. Alexander, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service; and Eric H. Holder, Jr., in his official capacity as Attorney General of the United States.

Respondents are Amnesty International USA; Global Fund for Women; Global Rights; Human Rights Watch; International Criminal Defence Attorneys Association; The Nation Magazine; PEN American Center; Service Employees International Union; Washington Office on Latin America; Daniel N. Arshack; David Nevin; Scott McKay; and Sylvia Royce.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 18
Argument:
Respondents failed to establish their Article III standing to sue 22
A. Respondents' asserted future injuries are conjectural and not imminent 24
B. Respondents' asserted ongoing, present injuries are not cognizable injuries in fact that likely would be redressed by judicial relief enjoining foreign-intelligence activity authorized by Section 1881a 38
1. Self-inflicted harms are not cognizable injuries in fact 38
2. Respondents failed to establish that their asserted ongoing injuries would likely be redressed by an injunction 44
Conclusion 47

TABLE OF AUTHORITIES

Cases:

ACLU v. *NSA*, 493 F.3d 644 (6th Cir. 2007), cert. denied, 552 U.S. 1179 (2008) 14
ASARCO Inc. v. *Kadish*, 490 U.S. 605 (1989) 47
Al-Kidd v. *Gonzales*, No. 05-cv-93, 2008 WL 5123009 (D. Idaho Dec. 4, 2008) 32
Allen v. *Wright*, 468 U.S. 737 (1984) 35, 36

Cases—Continued: Page

Babbitt v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) 24, 25, 27
Bigelow v. *Virginia*, 421 U.S. 809 (1975) 40
CIA v. *Sims*, 471 U.S. 159 (1985) 36
City of L.A. v. *Lyons*, 461 U.S. 95 (1983) 13, 26, 28
DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 22, 28, 31, 36
Davis v. *FEC*, 554 U.S. 724 (2008) 23
Department of the Navy v. *Egan*, 484 U.S. 518 (1988) ... 36
Directives, In re, 551 F.3d 1004 (FISC Rev. 2008) 8
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 24, 42, 43
Haig v. *Agee*, 453 U.S. 280 (1981) 35, 36
Laird v. *Tatum*, 408 U.S. 1 (1972) 14, 21, 37, 40, 41, 42
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ..... *passim*
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) 29
MedImmune, Inc. v. *Genentech, Inc.*, 549 U.S. 118 (2007) 27
Meese v. *Keene*, 481 U.S. 465 (1987) 42, 43
National Family Planning & Reprod. Health Ass'n v. *Gonzales*, 468 F.3d 826 (D.C. Cir. 2006) 39
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 28
Pennsylvania v. *New Jersey*, 426 U.S. 660 (1976) 38
Raines v. *Byrd*, 521 U.S. 811 (1997) 23, 35, 36
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 24, 35

Cases—Continued: Page

Sierra Club v. *Morton*, 405 U.S. 727 (1972) 42
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 35
Snepp v. *United States*, 444 U.S. 507 (1980) 35
Summers v. *Earth Island Inst.*, 555 U.S. 488 (2009) 17, 23, 24, 25, 26, 27
United Presbyterian Church v. *Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) 14, 31, 41
United States v. *Duggan*, 743 F.2d 59 (2d Cir. 1984) 9
United States v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) 43
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 7
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 20, 25, 35, 36
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) ..... *passim*

Constitution, statutes, regulation and rule:

U.S. Const.:
Art. III ..... *passim*
Amend. I 40
Amend. IV 7, 8, 34, 38
FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436:
§ 101(a)(2), 122 Stat. 2438 (FISA § 702) 4
§ 403(b)(1), 122 Stat. 2474 9

Statutes, regulation and rule—Continued: Page

Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (50 U.S.C. 1801 *et seq.* (2006 & Supp. II 2008)) 2
50 U.S.C. 1801(a)(1) 32
50 U.S.C. 1801(e) (2006 & Supp. II 2008) 6, 10
50 U.S.C. 1801(f) 2, 3, 33
50 U.S.C. 1801(f)(2) 32
50 U.S.C. 1801(h) 3, 6
50 U.S.C. 1801(h)(1) 7
50 U.S.C. 1801(i) 3
50 U.S.C. 1801(k) 8
50 U.S.C. 1803(a) (Supp. II 2008) 3
50 U.S.C. 1804(a) (Supp. II 2008) 3
50 U.S.C. 1805 (2006 & Supp. II 2008) 3
50 U.S.C. 1805(a) (Supp. II 2008) 32, 45
50 U.S.C. 1805(a)(2) (Supp. II 2008) 3
50 U.S.C. 1805(a)(3) (Supp. II 2008) 3
50 U.S.C. 1805(c)(2)(A) 3
50 U.S.C. 1806(c) 8
50 U.S.C. 1806(e) 8
50 U.S.C. 1806(f) 8
50 U.S.C. 1809(a)(1) (Supp. II 2008) 3
50 U.S.C. 1821(4)(A) 7
50 U.S.C. 1881 *et seq.* (Supp. II 2008) (Tit. VII) 9, 38
50 U.S.C. 1881(a) (Supp. II 2008) 6, 10
50 U.S.C. 1881a (Supp. II 2008) (§ 702) ..... *passim*
50 U.S.C. 1881a(a) (Supp. II 2008) 5, 6

Statutes, regulation and rule—Continued: Page

50 U.S.C. 1881a(b) (Supp. II 2008) 6, 7
50 U.S.C. 1881a(b)(1) (Supp. II 2008) 5, 6, 29
50 U.S.C. 1881a(b)(2) (Supp. II 2008) 6, 29
50 U.S.C. 1881a(b)(3) (Supp. II 2008) 5, 29
50 U.S.C. 1881a(b)(5) (Supp. II 2008) 6, 34
50 U.S.C. 1881a(c)(1) (Supp. II 2008) 6
50 U.S.C. 1881a(c)(1)(A) (Supp. II 2008) 7
50 U.S.C. 1881a(c)(2) (Supp. II 2008) 5
50 U.S.C. 1881a(d) (Supp. II 2008) 5, 6, 7
50 U.S.C. 1881a(d)(1) (Supp. II 2008) 7
50 U.S.C. 1881a(e) (Supp. II 2008) 5, 6, 7
50 U.S.C. 1881a(e)(1) (Supp. II 2008) 7
50 U.S.C. 1881a(f)(1)(A) (Supp. II 2008) 7
50 U.S.C. 1881a(g)(1)(B) (Supp. II 2008) 5
50 U.S.C. 1881a(g)(2)(A)(i) (Supp. II 2008) 6
50 U.S.C. 1881a(g)(2)(A)(ii) (Supp. II 2008) 6
50 U.S.C. 1881a(g)(2)(A)(vi) (Supp. II 2008) 6
50 U.S.C. 1881a(g)(2)(A)(vii) (Supp. II 2008) 6
50 U.S.C. 1881a(g)(2)(B) (Supp. II 2008) 5, 6
50 U.S.C. 1881a(h)(4) (Supp. II 2008) 8
50 U.S.C. 1881a(h)(6) (Supp. II 2008) 8
50 U.S.C. 1881a(i)(1) (Supp. II 2008) 7
50 U.S.C. 1881a(i)(2) (Supp. II 2008) 6, 7
50 U.S.C. 1881a(i)(2)(B) (Supp. II 2008) 8
50 U.S.C. 1881a(i)(2)(C) (Supp. II 2008) 8
50 U.S.C. 1881a(i)(3) (Supp. II 2008) 6
50 U.S.C. 1881a(i)(3)(A) (Supp. II 2008) 7, 8, 34

Statutes, regulation and rule—Continued: Page

50 U.S.C. 1881a(*l*) (Supp. II 2008) 8
50 U.S.C. 1881a(*l*)(1)(B) (Supp. II 2008) 37
50 U.S.C. 1881a(*l*)(2)(D)(iii) (Supp. II 2008) 37
50 U.S.C. 1881a(*l*)(3)(C)(iv) (Supp. II 2008) 37
50 U.S.C. 1881b (Supp. II 2008) 5
50 U.S.C. 1881b(a)(1) (Supp. II 2008) 5
50 U.S.C. 1881b(c) (Supp. II 2008) 5
50 U.S.C. 1881c (Supp. II 2008) 5
50 U.S.C. 1881c(a)(2) (Supp. II 2008) 5
50 U.S.C. 1881c(c) (Supp. II 2008) 5
50 U.S.C. 1881e(a) (Supp. II 2008) 8
50 U.S.C. 1881f(a) (Supp. II 2008) 8, 37
50 U.S.C. 1881f(b)(1) (Supp. II 2008) 8, 37
Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2510 *et seq.* 3
Protect America Act of 2007, Pub. L. No. 110-55, secs. 2-3, §§ 105A-105C, 121 Stat. 552-555 (50 U.S.C. 1805a-1805c (Supp. I 2007)) 8
50 U.S.C. 403-5a(a) 4
Exec. Order No. 12,333, 3 C.F.R. 200 (1981 Comp.), reprinted as amended in 50 U.S.C. 401 note (Supp. II 2008) 4, 33, 41, 45
§ 1.3(b)(4), as amended 4
§ 1.7(a)(1), as amended 4
§ 1.7(a)(5), as amended 4
§ 1.7(c)(1), as amended 4
§ 2.2 4

Rule—Continued: Page

Fed. R. Civ. P.:

Rule 56(c)(2) 29

Rule 56(c)(4) 29

Miscellaneous:

Letter from Director of National Intelligence James R. Clapper to Speaker John Boehner et al. (Mar. 26, 2012), http://www.dni.gov/electronic_reading_room/dni%20letter%20with%20fisa%20amendments.pdf 9

S. Rep. No. 701, 95th Cong., 2d Sess. (1978) 4, 32

S. Rep. No. 174, 112th Cong., 2d Sess. (2012) 37, 38

In the Supreme Court of the United States

No. 11-1025

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is reported at 638 F.3d 118. The order of the court of appeals denying rehearing en banc (Pet. App. 114a-115a), and opinions regarding the denial of rehearing (Pet. App. 116a-196a), are reported at 667 F.3d 163. The opinion of the district court (Pet. App. 62a-113a) is reported at 646 F. Supp. 2d 633.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2011. A petition for rehearing was denied on September 21, 2011 (Pet. App. 114a-115a). On December 9, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and in-

cluding January 19, 2012. On January 10, 2012, Justice Ginsburg further extended the time to February 18, 2012, and the petition was filed on February 17, 2012. The petition for a writ of certiorari was granted on May 21, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (50 U.S.C. 1801 *et seq.* (2006 & Supp. II 2008)), are set out in the appendix to the petition (Pet. App. 415a-468a).[1]

STATEMENT

1. Congress enacted FISA in 1978 to regulate, *inter alia*, the government's use of certain types of communications surveillance for foreign-intelligence purposes. In doing so, Congress limited the definition of the "electronic surveillance" governed by FISA to four discrete types of domestically focused foreign-intelligence activities. See 50 U.S.C. 1801(f). Specifically, Congress defined "electronic surveillance" in FISA to mean (1) the acquisition of the contents of a wire or radio communication obtained by "intentionally targeting" a "particular, known United States person who is in the United States" in certain circumstances; (2) the acquisition of the contents of a wire communication to or from a "person in the United States" when the "acquisition occurs in the United States"; (3) the intentional acquisition of the contents of certain radio communications when "the

---

[1] All citations to FISA in this brief are to the 2006 edition of the United States Code as supplemented, where relevant, by the Code's 2008 Supplement.

sender and all intended recipients are located within the United States"; and (4) the installation or use of a surveillance device "in the United States" for monitoring or to acquire information other than from a wire or radio communication in certain circumstances. *Ibid.*; cf. 50 U.S.C. 1801(i) (defining "United States person").

Before the United States may conduct such "electronic surveillance" to obtain foreign-intelligence information, FISA generally requires the government to obtain an order from a judge on the Foreign Intelligence Surveillance Court (FISC). 50 U.S.C. 1805, 1809(a)(1); see 50 U.S.C. 1803(a), 1804(a). To obtain such an order, the government must establish, *inter alia*, probable cause to believe that the "target of the electronic surveillance" is a foreign power or an agent thereof and that "each of the facilities or places" at which the surveillance is directed (inside or outside the United States) is being used, or is about to be used, by a foreign power or its agent. 50 U.S.C. 1805(a)(2). The government must also establish that the "minimization procedures" that it will employ are reasonably designed to minimize the acquisition and retention, and prohibit the dissemination, of nonpublic information concerning "United States persons," consistent with the government's need to obtain, produce, and disseminate foreign-intelligence information. 50 U.S.C. 1801(h), 1805(a)(3) and (c)(2)(A).[2]

Because of FISA's definition of "electronic surveillance," FISA as originally enacted did not apply to the vast majority of surveillance the government conducted

---

[2] Congress has separately authorized other types of domestic surveillance activities. For example, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, regulates the interception of wire, oral, or electronic communications for law-enforcement purposes.

outside the United States, even if that surveillance might specifically target United States citizens abroad or incidentally acquire (while targeting third parties abroad) communications to or from citizens in the United States. See S. Rep. No. 701, 95th Cong., 2d Sess. 7 & n.2, 34-35 & n.16 (1978). Instead, Executive Order No. 12,333, as amended, addresses the government's "human and technical collection techniques * * * undertaken abroad." Exec. Order No. 12,333, § 2.2, 3 C.F.R. 210 (1981 Comp.), reprinted as amended in 50 U.S.C. 401 note (Supp. II 2008). That Executive Order governs the intelligence community, *inter alia*, in collecting "foreign intelligence and counterintelligence" abroad, collecting "signals intelligence information and data" abroad, and utilizing intelligence relationships with "intelligence or security services of foreign governments" that independently collect intelligence information. *Id.* §§ 1.3(b)(4), 1.7(a)(1), (5) and (c)(1).[3]

2. This case involves a constitutional challenge to Section 702 of FISA, 50 U.S.C. 1881a, which was enacted in 2008 as part of the FISA Amendments Act of 2008 (FAA), Pub. L. No. 110-261, sec. 101(a)(2), § 702, 122 Stat. 2438. That provision—referred to here as Section 1881a—establishes new, supplemental procedures for authorizing certain types of surveillance targeting non-United States persons located outside the United States when the acquisition involves obtaining foreign-

---

[3] Congress has separately authorized certain intelligence activities abroad for purposes other than for obtaining foreign intelligence. The intelligence community has statutory authority to "collect information outside the United States about individuals who are not United States persons" for "purposes of a law enforcement investigation," when requested by a United States law-enforcement agency. 50 U.S.C. 403-5a(a).

intelligence information from or with the assistance of an electronic communication service provider.[4]

Section 1881a provides that, "upon the issuance" of an order from the FISC, the Attorney General and Director of National Intelligence may jointly authorize the "targeting of persons reasonably believed to be located outside the United States" for a period of up to one year to acquire "foreign intelligence information." 50 U.S.C. 1881a(a).[5] Section 1881a specifies that the authorized acquisition may not intentionally "target a United States person"—whether that person is known to be in the United States or is reasonably believed to be outside the United States, 50 U.S.C. 1881a(b)(1) and (3)—and may not target a person outside the United States "if the

---

[4] The FAA enacted other amendments to FISA, including provisions not at issue in this case that govern the targeting of United States persons abroad. See 50 U.S.C. 1881b, 1881c. Section 1881c provides new privacy protections for United States persons abroad by generally requiring the government to obtain an order from the FISC and to follow minimization procedures when intentionally targeting such a person for foreign-intelligence information, if the person has a reasonable expectation of privacy and a court warrant would be required if the acquisition were conducted inside the United States for law-enforcement purposes. 50 U.S.C. 1881c(a)(2) and (c). Other procedures apply when the acquisition constitutes electronic surveillance or the acquisition of stored electronic communications or data that requires a FISA order and the acquisition is conducted within the United States. 50 U.S.C. 1881b(a)(1) and (c).

[5] The Attorney General and Director may authorize targeting to commence under Section 1881a before the FISC issues its order if they determine that certain "exigent circumstances" exist. 50 U.S.C. 1881a(a) and (c)(2). If that determination is made, the Attorney General and Director must, as soon as practicable (and within seven days), submit for FISC review their Section 1881a certification, including the targeting and minimization procedures used in the acquisition. 50 U.S.C. 1881a(g)(1)(B); see 50 U.S.C. 1881a(d), (e) and (g)(2)(B).

purpose * * * is to target a particular, known person reasonably believed to be in the United States," 50 U.S.C. 1881a(b)(2). Section 1881a further requires that the acquisition be "conducted in a manner consistent with the [F]ourth [A]mendment." 50 U.S.C. 1881a(b)(5).

Section 1881a does not require an individualized court order addressing each non-United States person to be targeted under its provisions. Section 1881a instead permits the FISC to approve certifications by the Attorney General and Director of National Intelligence that identify categories of foreign intelligence targets. Specifically, Section 1881a requires the government to obtain the FISC's approval of (1) the government's certification regarding the proposed surveillance, and (2) the targeting and minimization procedures to be used in the acquisition. 50 U.S.C. 1881a(a), (c)(1) and (i)(2) and (3); see 50 U.S.C. 1881a(d), (e) and (g)(2)(B). The certification must be made by the Attorney General and Director of National Intelligence and must attest that, *inter alia*, (1) the acquisition does not violate the Fourth Amendment and complies with the aforementioned limitations prohibiting the targeting of United States persons; (2) the acquisition involves obtaining "foreign intelligence information from or with the assistance of an electronic communication service provider"; (3) the targeting procedures in place are reasonably designed to ensure that any acquisition targets only persons reasonably believed to be outside the United States; and (4) the minimization procedures appropriately restrict the acquisition, retention, and dissemination of nonpublic information about United States persons. 50 U.S.C. 1881a(g)(2)(A)(i), (ii), (vi) and (vii); see 50 U.S.C. 1801(h), 1881a(b); cf. 50 U.S.C. 1801(e), 1881(a) (defining "foreign intelligence information").

The FISC must review the certification, targeting and minimization procedures, and any amendments thereto. 50 U.S.C. 1881a(i)(1) and (2). If the FISC determines that the certification contains all the required elements and that the procedures are "consistent with" the Act and "the [F]ourth [A]mendment," the FISC will issue an order approving the certification and the use of the targeting and minimization procedures. 50 U.S.C. 1881a(i)(3)(A).

Section 1881a addresses the possibility that surveillance targeting non-United States persons abroad, to whom the Fourth Amendment does not apply, see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), might incidentally acquire the communications of certain United States persons who communicate with the foreign surveillance targets. Specifically, the government may conduct Section 1881a-authorized surveillance only in accordance with specific targeting and minimization procedures that are subject to judicial review by the FISC. 50 U.S.C. 1881a(c)(1)(A), (d), (e) and (i)(3)(A). Not only must the targeting procedures be reasonably designed to restrict acquisitions to the targeting of persons reasonably believed to be abroad and applied using compliance guidelines to ensure that the acquisition does not intentionally target a United States person, 50 U.S.C. 1881a(b), (d)(1) and (f)(1)(A), the minimization procedures must be reasonably designed to minimize any "acquisition" of nonpublicly available information about unconsenting United States persons, and to minimize the "retention" and prohibit the dissemination of any such information that might still be acquired, consistent with the need to obtain, produce, and disseminate foreign-intelligence information, 50 U.S.C. 1801(h)(1), 1821(4)(A); see 50 U.S.C. 1881a(e)(1). The FISC, in

turn, must review the targeting and minimization procedures to ensure that they satisfy the statutory criteria and are consistent with the Fourth Amendment. 50 U.S.C. 1881a(i)(2)(B), (C) and (3)(A).

Section 1881a further requires that the Attorney General and Director of National Intelligence periodically assess the government's compliance with both the targeting and minimization procedures and with relevant compliance guidelines, and that they submit those assessments both to the FISC and to congressional oversight committees. 50 U.S.C. 1881a(*l*). The Attorney General must also keep the relevant oversight committees "fully inform[ed]" concerning the implementation of Section 1881a. 50 U.S.C. 1881f(a) and (b)(1).

If the government intends to use or disclose any information obtained or derived from its acquisition of a person's communications under Section 1881a in judicial or administrative proceedings against that person, it must provide advance notice of its intent to the tribunal and the person, whether or not the person was targeted for surveillance under Section 1881a. 50 U.S.C. 1881e(a); see 50 U.S.C. 1801(k), 1806(c). That person may then challenge the use of that information in district court by challenging the lawfulness of the Section 1881a acquisition. 50 U.S.C. 1806(e) and (f), 1881e(a). Separately, any electronic service provider the government directs to assist in Section 1881a surveillance may challenge the lawfulness of that directive in the FISC. 50 U.S.C. 1881a(h)(4) and (6); cf. Pet. App. 144a-145a.[6]

---

[6] Cf. also, *e.g.*, *In re Directives*, 551 F.3d 1004 (FISC Rev. 2008) (adjudicating Fourth Amendment challenge brought by electronic service provider to directive issued under Section 1881a's predecessor provisions in the Protect America Act of 2007, Pub. L. No. 110-55, secs. 2-3, §§ 105A-105C, 121 Stat. 552-555 (50 U.S.C. 1805a-1805c (Supp. I 2007)

3. On the day Section 1881a was enacted (July 10, 2008), respondents—four individual attorneys and nine organizations in the United States—filed this action challenging the provision's constitutionality. Pet. App. 197a, 200a-203a, 240a-241a. Respondents seek a declaration that Section 1881a is facially unconstitutional and an injunction permanently enjoining the government from "conducting surveillance pursuant to the authority granted by section [1881a]." *Id.* at 241a.[7]

At summary judgment, three attorney respondents and three organizational respondents submitted evidence supporting their assertion of Article III standing.[8] Respondents do not claim that they will, or ever could be, targeted for surveillance under Section 1881a. They instead assert that they "reasonably believe" that their communications will be incidentally acquired under Sec-

---

(repealed 2008)); *United States* v. *Duggan*, 743 F.2d 59 (2d Cir. 1984) (addressing constitutional challenge to FISA by individual against whom evidence collected under FISA was introduced).

[7] Title VII of FISA, which includes Section 1881a, is scheduled to sunset on December 31, 2012. See FAA § 403(b)(1), 122 Stat. 2474. The extension of Title VII's authority is the "top legislative priority" of the intelligence community. See Letter from Director of National Intelligence James R. Clapper to Speaker John Boehner et al. 1 (Mar. 26, 2012), http://www.dni.gov/electronic_reading_room/dni%20letter%20with%20fisa%20amendments.pdf.

[8] See Pet. App. 349a-353a (respondent Sylvia Royce's declaration); *id.* at 368a-375a (respondent Scott McKay's declaration for himself and respondent David Nevin); *id.* at 334a-339a, 363a-367a (Naomi Klein's and Christopher Hedges's declarations for respondent Nation Magazine); *id.* at 340a-347a (Joanne Marnier's declaration for respondent Human Rights Watch); *id.* at 354a-362a (John Walsh's declaration for respondent Washington Office on Latin America). The seven other respondents submitted no evidence to support their asserted standing. Gov't C.A. Br. 19 n.7.

tion 1881a, because they communicate with people abroad whom they believe the "U.S. government is likely to target" for surveillance under Section 1881a. Pet. App. 214a; see *id.* at 337a, 343a-344a, 350a-352a, 356a-357a, 366a, 370a-371a. Respondents state that their work requires them to engage in telephone and email communications with non-United States persons located outside the United States who, respondents contend, are alleged to be associated with terrorists or terrorist organizations; are foreign government officials; are political activists opposing governments supported by the United States; or are located in geographic areas that are a special focus of the government's counterterrorism or diplomatic efforts. *Ibid.*; *id.* at 214a. Respondents believe that some of the information they exchange with those individuals involves "foreign intelligence information" as defined by 50 U.S.C. 1801(e) and 1881(a). Pet. App. 215a. Based on their asserted fear that their communications may be incidentally intercepted by Section 1881a surveillance targeting others abroad, respondents contend that they "will have to take burdensome and costly measures to minimize the chance" of such an interception by, for instance, "travel[ing] long distances to collect information that could otherwise have been gathered by telephone or email." *Ibid.*; see *id.* at 338a, 345a, 352a, 367a, 372a-373a.

4. The district court dismissed respondents' claims at summary judgment for want of Article III standing. Pet. App. 62a-113a.

The district court first determined that respondents' "abstract fear that their communications will be monitored under the FAA" in the future (Pet. App. 84a-85a) does not constitute an Article III injury in fact. *Id.* at 82a-100a. The court explained that courts of appeals

had previously rejected similar standing assertions based on plaintiffs' "fear of surveillance," and that respondents' "alleged injury * * * [was] even more speculative" than those previously held insufficient. *Id.* at 86a-87a, 100a. Section 1881a, the court explained, "does not authorize the surveillance of [respondents'] communications" because Section 1881a-authorized surveillance cannot "target [respondents]." *Id.* at 85a. The court further observed that respondents "make no claim that their communications have yet been monitored" and "make no allegation or showing that the surveillance of their communications has been authorized or that the Government has sought approval for such surveillance." *Id.* at 63a. Whether the government would ultimately seek a Section 1881a "order * * * that affects [respondents'] rights" and "whether such [a request] would be granted by the FISC," the court concluded, was "completely speculative." *Id.* at 85a; see *id.* at 96a-97a.

The district court likewise held that respondents could not establish Article III standing based on the cost of measures they purportedly take to protect the confidentiality of their communications. Pet. App. 100a-112a. The court explained that this second, cost-based theory was not a "truly independent" one, because "the costs incurred by [respondents] flow directly from [their] fear of surveillance." *Id.* at 101a. Respondents, the court held, "cannot manufacture a sufficient basis for standing from an insufficient one" by electing to expend their own funds or alter their actions. *Ibid.*

5. A panel of the court of appeals reversed. Pet. App. 1a-61a. The court held that respondents established Article III standing based on (1) their fear that the government would cause them a "future injury" by intercepting their communications under Section 1881a,

and (2) their claim that their own "expenditure of funds" is a "present injury" caused by Section 1881a, *id.* at 25a-27a. See *id.* at 25a-50a.

a. Taking the second theory first, the court of appeals concluded that respondents' "expenditure of funds" qualified as "the most mundane [type] of injuries in fact." Pet. App. 26a. In the court's view, those injuries were "caused by the challenged statute" because "it was not unreasonable for [respondents] to incur costs out of fear that the government will intercept their communications under [Section 1881a]." *Id.* at 27a. The court stated that a "plaintiff's self-inflicted injury" will not be fairly traceable to a statute if it results from an unreasonable decision by the plaintiff; but the court reasoned that, in this case, respondents' asserted injuries were caused by Section 1881a because their "fear of the FAA" was not "fanciful, paranoid, or otherwise unreasonable" and because, in the court's view, the "possibility of interception is [not] remote or fanciful." *Id.* at 27a-28a; see *id.* at 31a-36a. The court recognized that Section 1881a does not authorize surveillance "target-[ing] [respondents] themselves," but it concluded that that fact did not alter the analysis (*id.* at 41a), because it determined that a plaintiff can establish Article III "standing to challenge a statute that does not regulate him if he can show that the statute reasonably caused him to alter or cease certain conduct," *id.* at 46a. See *id.* at 41a-46a.

In this case, the court found it "significant that the injury that [respondents] fear results from conduct that is authorized by statute." Pet. App. 36a. "[T]he fact that the government has authorized the potentially harmful conduct" by enacting Section 1881a, the court reasoned, "means that [respondents] can reasonably as-

sume that government officials will actually engage in that conduct by carrying out the authorized surveillance." *Id.* at 36a-37a. Although the court identified no evidence of the government's actual surveillance activities under Section 1881a (or other legal authority), the court deemed it "extremely likely" that the government would "undertake broad-based surveillance" under the authority of Section 1881a and concluded that respondents had "good reason to believe that their communications" would be intercepted because the government did not dispute respondents' speculation that they communicate with "likely targets of FAA surveillance." *Id.* at 37a. The court rested its conclusion on what it labeled a "reasonable interpretation of [Section 1881a] and a realistic understanding of the world," opining that it was "reasonable to expect that the government will seek surveillance authorization under [Section 1881a]" and that it was "fanciful to suggest" that the government would "more than rarely fail" to convince the FISC to issue an order authorizing such surveillance. *Id.* at 38a-40a. Given that possibility of future surveillance, the court found it "reasonable for [respondents] to take measures to avoid being overheard." *Id.* at 47a-49a.

b. The court of appeals likewise held that respondents could establish Article III standing under their "future-injury theory." Pet. App. 29a. The court stated that "probabilistic [future] injuries constitute injuries in fact only when they reach a certain threshold of likelihood." *Id.* at 26a (citing *City of L.A.* v. *Lyons*, 461 U.S. 95, 107 n.8 (1983)). The court then concluded that the prospect that the government would intercept respondents' communications using FISC-approved surveillance targeting others under Section 1881a was "sufficiently likely to confer standing" because, in its view, the

test for "basing standing on the risk of future harm" simply requires "an objectively reasonable likelihood" of such harm. *Id.* at 29a. For the reasons discussed above, the court concluded that "[Section 1881a] creates an objectively reasonable likelihood that [respondents'] communications are being or will be monitored under the FAA." *Ibid.*

c. The court of appeals found this Court's standing analysis in *Laird* v. *Tatum*, 408 U.S. 1 (1972), to be inapplicable. Pet. App. 50a-60a. Although the court noted that *Laird* held that the plaintiffs had failed to establish Article III standing to "challenge[] a surveillance program" based on their claim that the program's "chilling effect" caused them to cease expressive activities, the court of appeals concluded that respondents had established "specific and concrete injuries" different than those in *Laird*. *Id.* at 50a-54a. The court acknowledged that the D.C. Circuit has read *Laird* as requiring that a plaintiff prove "some concrete harm (past or immediately threatened) *apart from* the 'chill' itself," *id.* at 56a (quoting *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375, 1378 (1984) (Scalia, J.)), and that the Sixth Circuit's decision in *ACLU* v. *NSA*, 493 F.3d 644 (2007), cert. denied, 552 U.S. 1179 (2008), was in accord. Pet. App. 56a & n.31, 59a. But the court of appeals stated that the "interpretations of *Laird*" adopted by those circuits—both of which read "*Laird* essentially the same way [as] the government"—were not "persuasive." *Id.* at 58a-59a.

d. Finally, the court of appeals held that respondents satisfied the redressability prong of the standing analysis. Pet. App. 41a n.24. It reasoned that judicial relief would likely redress respondents' claimed injury, because "[respondents'] injuries stem from their reason-

able fear of being monitored by FAA-authorized government surveillance," and the requested injunction would "prohibit[] the government from conducting surveillance under the FAA." *Ibid.*

6. The court of appeals denied the government's petition for en banc rehearing by an equally divided, six-to-six vote. Pet. App. 114a-115a. Judge Lynch, who authored the panel opinion, authored an opinion concurring in the denial of rehearing, which no other judge joined. *Id.* at 116a-133a. Four other judges authored dissenting opinions. *Id.* at 133a-175a (Raggi, J.), 175a-189a (Livingston, J.), 189a-196a (Jacobs, C.J.), 196a (Hall, J.).

a. Judge Raggi, who authored the principal dissent on behalf of five judges, concluded that the panel's "novel, relaxed standing standard" was "unprecedented," was "wholly at odds with Supreme Court precedent," and "create[d] a split" with the other circuits that have addressed "standing to challenge foreign intelligence surveillance programs." Pet. App. 133a, 135a. She explained that the panel erred in ruling that respondents' "professed *fear* of interception under the statute," and their related choice to "incur[] costs to conduct conversations in person," were "sufficient to support standing because the fear is not 'irrational.'" *Id.* at 133a; see *id.* at 136a.

Judge Raggi found that a central flaw in the panel's analysis was its "reasoning that, in lieu of injury inflicted by the government through actual or imminent FAA interception, [respondents] can establish standing through self-inflicted injury, specifically, costs incurred to meet with foreign contacts rather than risk feared FAA interception." Pet. App. 147a. That error, she explained, enabled the panel to determine that "the likeli-

hood of interception becomes relevant only to causation, *i.e.* were the incurred costs 'fairly traceable' to the FAA?" *Id.* at 147a-148a. Under the panel's reasoning, Judge Raggi observed, "for the price of a plane ticket, [respondents] can transform their standing burden from one requiring a showing of actual or imminent FAA interception to one requiring a showing that their subjective fear of such interception is not 'fanciful,' 'irrational,' or 'clearly unreasonable.'" *Id.* at 148a.

Judge Raggi concluded that the panel's holding conflicts with this Court's precedents, which require plaintiffs who base Article III standing on a "future" injury to show that that injury is "imminent," *i.e.*, "*certainly* impending." Pet. App. 146a-147a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)). She explained that respondents' "subjective fear of FAA interception" is "plainly insufficient" to show a cognizable injury, and that respondents' related theory that they incurred costs to minimize the possibility of interception similarly reflected a type of "subjective chilling" insufficient under this Court's jurisprudence. *Id.* at 147a, 149a-151a. Judge Raggi also emphasized that the other courts of appeals that have confronted similar challenges to programs that, like Section 1881a, "authoriz[e], but [do] not direct[], intelligence surveillance" have "uniformly found that plaintiffs lacked standing precisely because they could not demonstrate actual or imminent interception." *Id.* at 162a; see *id.* at 161a-164a (discussing, *inter alia*, the D.C. and Sixth Circuits' decisions in *United Presbyterian Church* and *ACLU* v. *NSA*).

Finally, Judge Raggi concluded that respondents failed to demonstrate that their claimed injuries were redressable. Pet. App. 168a-173a. She noted that an

order "enjoining the FAA [would] merely eliminate one of several means for" monitoring the contacts who respondents believe "are 'likely' to be targeted for FAA surveillance." *Id.* at 169a. Even without the FAA, the United States could monitor such persons abroad with, for instance, "NSA surveillance programs" not covered by FISA or with surveillance under traditional FISA orders. *Id.* at 172a; see *id.* at 171a n.22. Judge Raggi also recognized what she termed the "real possibility" that "other countries" would target the same persons abroad given respondents' description of their contacts. *Id.* at 172a. Judge Raggi accordingly determined that respondents failed to show that their fear-related injuries likely would be redressed by enjoining only that subset of surveillance activities conducted under Section 1881a. *Id.* at 169a, 173a.

b. Judge Livingston's dissenting opinion for five judges (Pet. App. 175a-189a) described the panel's decision as a "truly unprecedented" and "startling" "transformation" of standing law involving "probabilistic harm," *id.* at 175a, 178a-179a. She noted that this Court has "said many times before" that allegations of "possible future injury do not satisfy the requirements of Art[icle] III," *id.* at 175a (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)) (brackets in original), and recently held that a "*statistical probability* of future harm" is insufficient, *id.* at 176a (discussing *Summers* v. *Earth Island Inst.*, 555 U.S. 488 (2009)). She reasoned that the panel erred in failing to demand that respondents show an "actual or imminently threatened" injury, *ibid.*, and explained that the panel's contrary analysis mistakenly relied on decisions addressing materially different contexts, *id.* at 180a-187a. The panel's mistaken view that "an 'objectively reasonable' threat of

future surveillance [is] sufficient for Article III standing," Judge Livingston ultimately concluded, was a "truly dramatic and unjustified expansion" of standing law that was "contrary to the approaches taken in surveillance cases by our sister circuits" and "not in keeping with the limited role of the judiciary in our constitutional structure." *Id.* at 188a-189a.

SUMMARY OF ARGUMENT

The court of appeals has held that respondents—who cannot be targeted by surveillance conducted under Section 1881a and who have not established that communications involving them have been or ever will be incidentally collected by any Section 1881a-authorized surveillance targeting third parties abroad—have Article III standing to challenge Section 1881a's constitutionality. The court based its ruling on its view that respondents showed (1) a sufficiently threatened "future injury" with an "objectively reasonable likelihood" of being incidentally exposed to such surveillance targeting others, and (2) an ongoing, "present injury" by incurring costs and altering their conduct in an effort to minimize the possibility of the surveillance they fear. That unprecedented holding is inconsistent with this Court's decisions, which require proof of a non-conjectural and imminent—*i.e.*, "certainly impending"—injury in fact where the prospect of future injury is the asserted basis for standing, and reject as insufficient self-imposed injuries stemming from the asserted chilling effect of a plaintiff's fears concerning a defendant's future actions.

1. It is well settled that plaintiffs seeking to establish Article III standing on the basis of a "future" injury must demonstrate that the asserted injury is imminent and not conjectural. Respondents' belief that the gov-

ernment is likely in the future to acquire the content of communications involving them by targeting third parties abroad under Section 1881a falls far short of this standard. Indeed, the court of appeals made no attempt to determine whether respondents established a non-conjectural and imminent injury, holding instead that respondents could establish standing with what in the court's assessment was an "objectively reasonable likelihood" of injury at some future point. Pet. App. 29a. That standard erroneously allows standing to be established with speculative assertions of possible future harm, disregarding this Court's repeated admonition that "threatened injury must be 'certainly impending' to constitute injury in fact" and that "[a]llegations of possible future injury" are insufficient. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citation omitted).

Respondents' evidentiary submission confirms the court of appeals' error. Respondents proffered declarations showing that they "believe" that it is likely that the government will at some point incidentally acquire communications involving them by targeting others abroad under Section 1881a. But it is wholly speculative, for instance, whether the government will imminently target respondents' (largely unidentified) foreign contacts abroad for foreign-intelligence information; whether the government would seek to use Section 1881a-authorized surveillance rather than the multiple other methods of foreign-intelligence collection; whether the FISC would issue an order permitting targeting in a manner allowing incidental collection of respondents' communications; and whether any resulting foreign-intelligence activity would, in fact, collect communications involving respondents. Respondents have no personal knowledge of any such matters, proffer no specific facts as support,

and leave all such details to conjecture. Respondents' asserted "understanding" that the government will conduct "dragnet" surveillance under Section 1881a to acquire the content of the communications of millions of United States persons (without even an Executive-Branch finding of individualized suspicion to limit surveillance targets) is even more speculative.

Respondents' conjecture highlights the extent to which the court of appeals' decision departs from fundamental principles of Article III standing. Allowing this case to be litigated on respondents' "beliefs" about possible future acts by the government and the FISC, unsupported by specific facts demonstrating an imminent injury to them, would require the courts to conduct constitutional review of actions of co-equal Branches of Government "in the rarified atmosphere of a debating society" without the "concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). This Court has made clear that the standing inquiry must be especially rigorous in this context to ensure that constitutional review, consistent with the separation-of-powers principles that animate Article III standing, is limited to suits in which the private parties invoking federal jurisdiction have demonstrated non-conjectural and imminent injuries from government action requiring judicial redress.

2. Respondents also cannot establish Article III standing based on asserted ongoing "present" harms—their own expenditure of money and altered communications practices—that they have elected to sustain in an attempt to avoid the Section 1881a-authorized surveillance they fear.

a. Self-inflicted harms are not cognizable Article III injuries. A federal suit is over once the plaintiff has failed to show a non-conjectural and imminent injury from the defendant's challenged actions. It is irrelevant whether the plaintiff also decides to impose other harms upon himself. Such self-inflicted damage adds nothing to the proper analysis. A plaintiff will have (or lack) standing based on the presence (or absence) of a non-conjectural and imminent injury from the defendant's challenged conduct. There is no basis for treating similarly situated plaintiffs differently on the ground that one has decided to take actions that harm himself but the other has not. Any contrary rule would erroneously allow litigants like respondents to manufacture Article III standing "for the price of a plane ticket." Pet. App. 148a (Raggi, J., dissenting).

Nor does the fact that respondents assert that they have altered their behavior because they genuinely "fear" the possibility that their communications will be incidentally acquired under Section 1881a change the analysis. Respondents' decision to curtail conduct to avoid a feared future injury reflects nothing more than a "subjective chill," which this Court has long held insufficient to establish standing. See *Laird* v. *Tatum*, 408 U.S. 1 (1972). Allegations of self-inflicted harm induced by a plaintiff's own fears simply are "not an adequate substitute for a claim of * * * a threat of specific future harm," *i.e.*, "immediately threatened injury." *Id.* at 14-15.

b. Even if such self-inflicted harms were cognizable injuries in fact, respondents have not shown that it is likely, as opposed to merely speculative, that their injury would be redressed by a favorable decision. Respondents' self-inflicted harms flow from their and their

foreign contacts' fears that the government will monitor their contacts' communications, but respondents do not seek to enjoin all possible government surveillance of their contacts. The government has several alternative means of conducting foreign-intelligence collection targeting non-United States persons abroad and, as respondents describe them, respondents' contacts could be targets for surveillance by other countries. It is thus wholly speculative whether an injunction halting only Section 1881a-authorized surveillance would redress respondents' asserted injuries. That is particularly true here, because respondents' self-imposed injuries appear to depend on the surveillance fears of their contacts, and respondents have failed to carry their heavy burden of demonstrating that stopping only Section 1881a-authorized activity would eliminate those third-party concerns.

ARGUMENT

RESPONDENTS FAILED TO ESTABLISH THEIR ARTICLE III STANDING TO SUE

To establish Article III standing, a plaintiff must demonstrate (1) that he has "suffered an injury in fact * * * which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a sufficient "causal connection between the injury and the conduct complained of"; and (3) a "likel[ihood]" that "the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks and citations omitted). The plaintiff must "demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) (citation omitted). And to seek prospective relief, the plaintiff must

establish an ongoing, present injury or an "actual and imminent"—not "conjectural"—threat of future injury. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009). That ongoing or imminent injury must be present "at the commencement of the litigation," *Davis* v. *FEC*, 554 U.S. 724, 732 (2008) (citation omitted), which in this case was the date Section 1881a was enacted. The analysis of those Article III standing requirements, which reflect fundamental separation-of-powers concerns, must be "especially rigorous" when federal courts are asked to conduct constitutional review of the actions of co-equal Branches of Government. *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

The court of appeals erroneously departed from these settled principles in holding that respondents established Article III standing to seek declaratory relief and an injunction permanently barring any foreign-intelligence surveillance from being conducted under Section 1881a. Respondents are United States persons who may not be targeted by surveillance conducted under Section 1881a, and they have not established that their communications have been or ever will be incidentally collected by any Section 1881a-authorized surveillance targeting foreign third parties abroad. The court of appeals nevertheless found Article III standing based on respondents' own speculative beliefs and fears about possible foreign-intelligence-collection activity targeting others under Section 1881a. The court rested its holding on (1) a purported "future injury"—the incidental interception of respondents' communications under Section 1881a—that is conjectural and not imminent, and (2) respondents' self-inflicted "present injury" resulting from their own and third parties' fear of such surveil-

lance. Neither provides a proper basis for Article III jurisdiction.

A. Respondents' Asserted Future Injuries Are Conjectural And Not Imminent

Respondents assert that they are threatened by Section 1881a-authorized surveillance directed at third parties abroad, because respondents believe that such surveillance could in the future incidentally acquire their own international communications. Respondents' assertion of that "future injury" falls far short of establishing a non-conjectural, imminent injury necessary to support Article III standing.

Plaintiffs who assert a threatened future injury as the basis for their standing must demonstrate that the purported injury in fact is "actual and imminent, not conjectural or hypothetical." *Summers*, 555 U.S. at 493; accord *Defenders of Wildlife*, 504 U.S. at 560, 564 n.2; *id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment) (The "threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'") (citation omitted). Indeed, this Court has long required that a "threatened injury * * * be 'certainly impending' to constitute injury in fact," *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (*Farm Workers*)); see *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (*Laidlaw*), in order "to ensure that the alleged injury is not too speculative for Article III purposes," *Defenders of Wildlife*, 504 U.S. at 565 n.2. Proof of an imminent and non-conjectural injury is also necessary to provide "the essential dimension of [factual] specificity" to a case, *Schlesinger* v. *Reservists Comm. to Stop the War*,

418 U.S. 208, 221 (1974), and to assure that legal questions "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

1. The court of appeals failed to apply those well-settled principles. The court made no attempt to determine whether respondents established a non-conjectural and "imminent" future injury to them that would result from a Section 1881a-authorized acquisition of communications obtained by targeting a non-United States person abroad, let alone conclude that such an acquisition was "certainly impending" on the day Section 1881a became law and respondents filed this suit. It instead held that respondents could establish standing by showing that "[Section 1881a] creates an objectively reasonable likelihood that [their] communications are being or will be monitored under the FAA." Pet. App. 29a. That novel standard of "likelihood" of injury at some undetermined future point disregards this Court's repeated admonition that a "threatened injury *must be 'certainly impending'* to constitute injury in fact." *Whitmore*, 495 U.S. at 158 (quoting *Farm Workers*, 442 U.S. at 298) (emphasis added). The Court has "said many times" that such "[a]llegations of possible future injury do not satisfy the requirements of Art[icle] III." *Ibid.*

The Court in *Summers*, for instance, required proof of an "imminent future injury" by plaintiffs seeking an injunction to halt the Forest Service's reliance on regulations authorizing it to take certain land-management actions without public notice or an opportunity for comment or appeal. 555 U.S. at 492-495. The plaintiffs in

Summers (like respondents here) attempted to challenge the regulations as an unlawful grant of authority, but the Court held that they failed to establish their standing because they could not identify an actual "application of the [challenged] regulations that threatens imminent and concrete harm." *Id.* at 494-495. The Court reasoned that it would "fly in the face of Article III's injury-in-fact requirement" to permit such an untethered challenge to a "regulation in the abstract." *Id.* at 494. The Court also concluded that the requisite injury in fact could not be established by a "statistical probability" of a future injury, *id.* at 497-499, and determined that a "*realistic* threat" of future harm does not satisfy "the requirement of 'imminent' harm," *id.* at 499-500. The court of appeals disregarded *Summers*' teachings: It allowed respondents to challenge Section 1881a's constitutionality "in the abstract," without any showing of an "imminent" and "concrete application" (*id.* at 494), because it found what it regarded as an "objectively reasonable likelihood" that the government would sometime in the future acquire communications involving respondents using authority conferred by Section 1881a. Pet. App. 29a.

The court of appeals concluded that *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), supported its contrary position because, in the court's view, *Lyons* "articulated the principle that a plaintiff may obtain standing by showing a sufficient likelihood of future injury." Pet. App. 33a; see *id.* at 31a-33a. But as *Summers* explained, *Lyons* is an "opinion that did *not* find standing, so the seeming expansiveness of the test made not a bit of difference"; it does not support a standing test satisfied by what a court may believe is a "realistic threat" of injury instead of proof of an actual, imminent future harm.

Summers, 555 U.S. at 499-500 (rejecting dissenters' view that *Lyons* suggested that standing might be shown with a "*realistic likelihood*" that proven, past conduct would recur in the "reasonably near future," *id.* at 505 (Breyer, J., dissenting) (citation omitted)).

Nor is the court of appeals' formulation supported by its suggestion that a "'realistic danger' of 'direct injury'" is sufficient to challenge "prospective government action." Pet. App. 30a (quoting *Farm Workers*, 442 U.S. at 298). In *Farm Workers*, this Court indicated that a "realistic danger of sustaining a direct injury" can support Article III standing; but in the following sentence, it made clear that the "threatened injury" it deemed sufficient was an "injury [that] is certainly impending." 442 U.S. at 298 (citation omitted). The Court then explained that that imminence requirement applies differently when a criminal statute directly prohibits a "course of conduct arguably affected with a constitutional interest" and a plaintiff establishes that he would "engage in [that] course of conduct" but for the statute. *Ibid.* In that context, the Court concluded that a plaintiff may challenge the statute directly regulating his conduct without having to violate the law and risk "'actual arrest or prosecution,'" if he can show a sufficiently "credible threat of prosecution." *Ibid.* (citation omitted).

Farm Workers stands for the proposition that when a plaintiff's own conduct is directly regulated by the statute he wishes to challenge and the plaintiff "claim[s] the right to do" the very thing the statute prohibits, the fact that the plaintiff has not yet violated the law will not destroy standing, because the "plaintiff's own action (or inaction) in failing to violate the law[, which] eliminates the [otherwise] *imminent* threat of prosecution," is "effectively coerced" by the threat. *MedImmune, Inc.* v.

Genentech, Inc., 549 U.S. 118, 129 (2007) (emphasis added); cf. *Lyons*, 461 U.S. at 103 (analyzing standing with the assumption that "[plaintiffs] will conduct their activities within the law and so avoid prosecution") (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974)) (brackets in original). Those principles are inapplicable here. Section 1881a does not directly regulate any private conduct (and certainly does not regulate respondents' conduct), nor does it provide for any sort of enforcement sanctions against respondents that could be claimed to "effectively coerce" them into eliminating an otherwise imminent injury.[9]

2. The court of appeals' reliance on respondents' summary-judgment evidence underscores the degree to which the court's ruling, turning on what it regarded as an "objectively reasonable likelihood" of injury (Pet. App. 29a), strays from this Court's established jurisprudence requiring a non-conjectural, imminent injury.

Respondents (who are the plaintiffs in this case) "bear[] the burden of proof" and therefore were required to proffer at summary judgment admissible evidence of "specific facts" establishing their Article III standing. *Defenders of Wildlife*, 504 U.S. at 561 (citation omitted); see *DaimlerChrysler Corp.*, 547 U.S. at 342 n.3. Declarations submitted to support standing not

---

[9] This Court has not limited its understanding of an "imminent" future injury to a particular timeframe for all factual contexts and has noted that "imminence" is a "somewhat elastic concept." *Defenders of Wildlife*, 504 U.S. at 565 n.2. However, the Court has emphasized that a plaintiff must show that his asserted "injury is '*certainly* impending,'" because the purpose of requiring an imminent injury is to "ensure that the alleged injury is not too speculative for Article III purposes" and to protect against the "possibility of deciding a case in which no injury would have occurred at all." *Ibid.* (quoting *Whitmore*, 495 U.S. at 158).

only must set out facts that would be admissible at trial, but also "must be made on personal knowledge" concerning matters about which the declarants are competent to testify. Fed. R. Civ. P. 56(c)(2) and (4). "[C]onclusory allegations" in such declarations do not satisfy respondents' affirmative evidentiary burden of proving Article III standing. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

Respondents, however, have rested their standing on conclusory statements of belief based on speculation about how the government might apply Section 1881a to target foreign persons abroad for foreign-intelligence information. See Pet. App. 334a-375a (respondents' declarations). As the dissenting judges below explained, because "[respondents] do not—and indeed cannot—profess personal knowledge" of the government's "targeting priorities and practices" for Section 1881a-authorized acquisitions, their asserted belief that their international communications are likely to be incidentally intercepted by future Section 1881a-authorized surveillance targeting foreigners abroad is impermissibly speculative and insufficient to prove a non-conjectural and imminent injury in fact. See, *e.g.*, Pet. App. 158a-159a (Raggi, J., dissenting from the denial of rehearing en banc).

The court of appeals nevertheless determined that "[Section 1881a] creates an objectively reasonable likelihood that [respondents'] communications are being or will be monitored under the FAA," Pet. App. 29a, based on respondents' speculation. That error is particularly significant in the context of respondents' facial challenge to Section 1881a. Section 1881a does *not* authorize surveillance targeting respondents or any other United States person, 50 U.S.C. 1881a(b)(1)-(3), and respon-

dents have never presented evidence that their international communications have ever been or will be incidentally acquired by Section 1881a-authorized surveillance targeting foreign third parties abroad. Respondents instead rely on two lines of speculation that their communications could be incidentally collected in Section 1881a-authorized surveillance.[10]

a. First, respondents' declarants state that they "*believe* that at least some of [their] international communications are likely to be collected" under Section 1881a's authority, because they state that they communicate with persons abroad who might be targeted for foreign-intelligence collection under Section 1881a. Pet. App. 337a (emphasis added); accord *id.* at 343a-344a, 350a, 356a-357a, 366a, 370a. That belief is speculative and unsupported by specific facts. In fact, respondents' evidence shows that their subjective beliefs reflect speculation piled upon speculation. Respondents, for instance, rely on conjecture that the government will choose to expend its limited resources to target respondents' own (largely unidentified) foreign contacts. Respondents state that they need to communicate with individuals in broadly defined categories located abroad, some of whom (respondents assert) criticize or oppose the interests of the United States. *E.g.*, Pet. App. 337a

[10] Seven respondents—Amnesty International USA, Global Fund for Women, Global Rights, International Criminal Defence Attorneys Association, PEN American Center, Service Employees International Union, and attorney Daniel N. Arshack—failed to present *any* proof of standing at summary judgment. See p. 9 & n.8, *supra*; cf. Pet. App. 215a-221a, 224a-226a, 229a-233a, 236a-238a (complaint alleging injuries to those respondents). The court of appeals clearly erred in reversing the district court's holding that those respondents failed to establish standing. Cf. *Defenders of Wildlife*, 504 U.S. at 561 (plaintiffs must proffer evidence of their standing to survive summary judgment).

("foreign political activists and political groups"), 342a ("victims of human rights abuses, witnesses, experts, scholars, political activists, and foreign governmental officials"), 359a ("Latin American and European government officials and non-governmental experts"). But respondents do not purport to have personal knowledge of how the government exercises its targeting authority under Section 1881a, much less provide any evidence that government officials will actually elect to target particular foreign persons with whom respondents may be in contact to collect foreign-intelligence information.

Even if respondents could have shown that they are at "greater risk than the public at large" of having their international communications intercepted under Section 1881a, that showing would have been insufficient. See *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375, 1380 (1984) (Scalia, J.). Because Section 1881a "does not *direct* intelligence-gathering activities against all persons who could conceivably come within its scope, but merely *authorizes*" the collection of certain information in certain contexts, *ibid.*, respondents must necessarily conjecture about how government officials will make targeting decisions for Section 1881a-authorized acquisitions. An asserted injury cannot be "imminent" where, as here, it is based on "speculati[on] that [government] officials will" take harmful actions. *DaimlerChrysler Corp.*, 547 U.S. at 344-345. Such conjecture gives "no assurance that the asserted injury is * * * 'certainly impending.'" *Ibid.* (quoting *Whitmore*, 495 U.S. at 158).

Respondents' subjective "belief" that third parties with whom they will communicate will likely be targeted under Section 1881a fails for numerous other reasons. Even if the government were to want to obtain the communications of such a person, respondents have prof-

fered nothing to show that the government would imminently acquire respondents' communications using surveillance *authorized by Section 1881a*. As Judge Raggi correctly recognized, there are "several means" for the intelligence community to collect information about non-United States persons outside the United States other than Section 1881a-authorized surveillance. Pet. App. 169a, 172a. The government, for instance, could utilize "electronic surveillance" under FISA when targeting a person abroad if there is probable cause to believe the person is a foreign power or an agent thereof. See p. 3, *supra*; 50 U.S.C. 1801(a)(1) (defining "foreign power").[11] Alternatively, it may utilize technical and other collection techniques abroad that do not fall within the FISA's geographically limited definition of "electronic surveillance," see pp. 2-3, *supra*, which Congress fashioned specifically to avoid regulating certain "international signals intelligence activities" by the NSA and other "electronic surveillance conducted outside the United States." S. Rep. No. 701, 95th Cong., 2d Sess. 71

---

[11] Respondent Scott McKay, for instance, "believe[s]" that his international communications with Sami Omar Al-Hussayen will be acquired under Section 1881a because the government previously intercepted Al-Hussayen's communications. Pet. App. 370a-371a. But it is a matter of public record that the government lawfully acquired Al-Hussayen's communications using FISA authority that existed long before Section 1881a. See *Al-Kidd* v. *Gonzales*, No. 05-cv-93, 2008 WL 5123009, at *5-*6 (D. Idaho Dec. 4, 2008) (finding that surveillance lawful). Respondents provide no reason to conclude that any ongoing surveillance targeting Al-Hussayen (if it were to occur) would not continue to operate under that authority. Cf. 50 U.S.C. 1801(f)(2), 1805(a) (authorizing targeting of agents of foreign powers in—or who communicate with persons in—the United States with surveillance directed at facilities used by the target if the acquisition occurs in the United States).

(1978).[12] Such foreign-intelligence collection conducted abroad is governed by Executive Order No. 12,333, not Section 1881a. See p. 4, *supra*. The government may also obtain information from the intelligence services of foreign countries, which are not bound by the United States Constitution or FISA when collecting intelligence about persons abroad or deciding whether to provide that information to the United States.

Furthermore, respondents provide no basis for concluding that the FISC would issue an order that would permit the targeting of respondents' foreign contacts in a manner that would allow the incidental collection of respondents' communications. See Pet. App. 165a-167a (Raggi, J., dissenting). Section 1881a imposes numerous requirements for targeting and minimization procedures (see pp. 6-8, *supra*), and it is a matter of conjecture how the Attorney General and Director would exercise their authority under Section 1881a and how the FISC would actually apply that section's requirements in an order under that provision. Respondents likewise provide no evidence suggesting that the government's targeting of third parties under such an order would ultimately collect respondents' communications.

b. Respondents' second line of speculation is equally insufficient. Respondents have argued in this Court that Section 1881a authorizes what they call "dragnet" surveillance—the acquisition of communications content without even an Executive-Branch finding of individual-

---

[12] For example, the targeting of non-United States persons abroad for foreign-intelligence collection involving the acquisition of the contents of international wireless (radio) communications and the contents of international wire communications (conducted outside of the United States) does not qualify as "electronic surveillance." See 50 U.S.C. 1801(f).

ized suspicion to limit surveillance targets—which, respondents have asserted, could include the acquisition of "all communications to and from specific countries" that would capture the communications of "thousands or even millions of U.S. citizens and residents." Br. in Opp. 1, 7, 33. But respondents have proffered no facts supporting that speculation. Their declarants have simply stated that it is their "understanding" that such "dragnet" surveillance would occur under Section 1881a. See, *e.g.*, Pet. App. 336a-337a, 356a, 365a, 370a, 374a.

Respondents' speculation is particularly odd in the context of this facial challenge to Section 1881a's constitutionality. Respondents have argued (Br. in Opp. 9) that the type of unfocused surveillance they "understand" could be conducted would violate the Fourth Amendment. See also Dist. Ct. Doc. 21, at 5, 20 & n.10, 28 (Dec. 15, 2008). But Section 1881a expressly provides that its authorization extends only to surveillance conducted "consistent with the [F]ourth [A]mendment," 50 U.S.C. 1881a(b)(5), and specifically requires the FISC to ensure that the government's targeting and minimization procedures governing foreign-intelligence collection under Section 1881a comply with the Fourth Amendment, 50 U.S.C. 1881a(i)(3)(A).

c. Notwithstanding the lack of evidence about the United States' actual conduct of relevant foreign-intelligence collection, the court of appeals relied on the court's own assessment of what is a "realistic understanding of the world" to determine the likely nature and scope of future foreign-intelligence acquisitions under Section 1881a. Pet. App. 38a. That reliance was doubly flawed. Respondents had the burden of "clearly and specifically set[ting] forth facts sufficient to satisfy [all] Art[icle] III standing requirements," and this Court

has made clear that a federal court is "powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore*, 495 U.S. at 155-156. Moreover, given the "secrecy of our Government's foreign intelligence operations"—a secrecy "'essential to the effective operation of our foreign intelligence service,'" *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (quoting *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam))—the court of appeals could not reliably determine without evidence what is "realistic" in this context. Such "unadorned speculation [does] not suffice to invoke the federal judicial power." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

4. Respondents' conjecture highlights the extent to which the court of appeals' decision departs from fundamental principles of Article III standing. Allowing this case to proceed based on such "beliefs" about possible future acts by the government—unsupported by specific facts establishing an imminent injury in fact—would wholly disregard this Court's longstanding requirement of a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action," and effectively require federal courts to resolve important legal questions in the abstract and "rarified atmosphere of a debating society." *Valley Forge Christian Coll.*, 454 U.S. at 472.

The consequences of that error are particularly acute in situations like this one, where a federal court must exercise its "most important and delicate" responsibility: constitutional review of the actions of co-equal Branches of Government. *Schlesinger*, 418 U.S. at 221. "[T]he law of Art[icle] III standing is built" on fundamental separation-of-powers principles, *Raines*, 521 U.S. at 820 (quoting *Allen* v. *Wright*, 468 U.S. 737, 752

(1984)), that are "designed to maintain" the Constitution's "'tripartite allocation of power'" by defining "'the proper—and properly limited—role of the courts in a democratic society,'" *DaimlerChrysler Corp.*, 547 U.S. at 341, 353 (quoting *Valley Forge Christian Coll.*, 454 U.S. at 474, and *Allen*, 468 U.S. at 750). This Court therefore has emphasized that the standing inquiry should be "especially rigorous" when resolving the merits would require a federal court "to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-820. Disregarding that admonition, the court of appeals' ruling would require a federal court to adjudicate the constitutionality of Section 1881a *in the abstract*, without the essential assistance of concrete facts concerning any actual, imminent surveillance affecting the persons challenging the law.

Strict adherence to that especially rigorous standard is all the more necessary when a litigant seeks to have the courts entertain a private suit concerning the actions of the Executive and Congress to protect the national security, which lie at the core of the constitutional responsibilities of the political Branches and require confidentiality for success. See, *e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988) (noting the courts' traditional reluctance to "intrude upon the authority of the Executive" in its discharge of its "Art[icle] II duties" involving "foreign policy" and "national security affairs") (citations omitted); *CIA* v. *Sims*, 471 U.S. 159, 172 n.16 (1985) ("Secrecy is inherently a key to successful intelligence operations."); *Agee*, 453 U.S. at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

The logic of the court of appeals' reasoning, moreover, extends well beyond the parties in this case. If respondents' speculative evidentiary proffer can establish standing based on what the court of appeals deemed to be an "objectively reasonable likelihood" (Pet. App. 29a) that the government would incidentally acquire international communications to which respondents might be parties sometime in the future while targeting third parties abroad using Section 1881a's authority, persons claiming to be likely *targets* of government surveillance in other contexts would be able to make a stronger (yet still speculative) claim to Article III standing. Permitting such challenges to the United States' foreign-intelligence-collection activities without requiring proof of a non-conjectural and imminent injury that would provide a concrete factual context for litigation would lead "the Judicial Branch [beyond] its proper, limited role in the constitutional framework of Government," *Defenders of Wildlife*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment), and require the federal courts to sit, at the behest of and with direct involvement of private litigants, "as virtually continuing monitors of the wisdom and soundness of Executive action," when that oversight "role is [one] appropriate for Congress," *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972).[13]

---

[13] The Executive Branch has kept Congress "fully inform[ed]" of its implementation of Section 1881a, 50 U.S.C. 1881f(a) and (b)(1); see 50 U.S.C. 1881a(*l*)(1)(B), (2)(D)(iii) and (3)(C)(iv), and Congress has exercised "close" and "extensive oversight" of the government's use of Section 1881a's authority ever since the 2008 enactment of Section 1881a. See S. Rep. No. 174, 112th Cong., 2d Sess. 2 (2012); see also *ibid.* (noting "extensive oversight by * * * the FISC"). The Senate Select Committee on Intelligence has found based on that extensive oversight

B. Respondents' Asserted Ongoing, Present Injuries Are Not Cognizable Injuries In Fact That Likely Would Be Redressed By Judicial Relief Enjoining Foreign-Intelligence Activity Authorized By Section 1881a

The court of appeals further held that respondents established Article III standing on the basis of "present" (ongoing) harms that respondents have chosen to sustain in an attempt to avoid the Section 1881a-authorized surveillance that they fear. Pet. App. 26a-28a, 41a n.24. That was error. Self-inflicted harms are not cognizable Article III injuries in fact and, even if they were, respondents failed to show that their requested relief would likely redress them.

1. Self-Inflicted Harms Are Not Cognizable Injuries In Fact

The court of appeals held that respondents' own "expenditure of funds" qualified as an injury in fact "caused by the challenged statute" because "it was not unreasonable for [respondents] to incur costs out of fear that the government will intercept their communications under [Section 1881a]." Pet. App. 26a-27a. The court stated that such a "self-inflicted injury" resulting from respondents' "fear of the FAA" establishes Article III standing because their fear was not "fanciful, paranoid, or otherwise unreasonable." *Id.* at 27a-28a. That expansive and novel holding is wrong.

a. No litigant "can be heard to complain about damage inflicted by its own hand." *Pennsylvania* v. *New*

---

that Title VII of the FAA (including Section 1881a) provides authority to conduct "critical" foreign-intelligence activities that have been "implemented with attention to protecting the privacy and civil liberties of U.S. persons." *Id.* at 2; see *id.* at 7-8 (additional views of Chairperson Feinstein) (discussing oversight regarding Section 1881a).

Jersey, 426 U.S. 660, 664 (1976) (per curiam). Respondents here have simply elected to expend their funds and alter some of their communication practices because they have decided to try to limit the possibility that international communications involving them might be incidentally acquired by government surveillance targeting non-United States persons. As the D.C. Circuit has "consistently held," such "self-inflicted harm doesn't satisfy the basic requirements for standing": It "does not amount to an 'injury' cognizable under Article III" and, even if it did, "it would not be fairly traceable to the defendant's challenged conduct." *National Family Planning & Reprod. Health Ass'n* v. *Gonzales*, 468 F.3d 826, 831 (2006). Respondents are fully capable of avoiding their own expenditure of money and stopping any other self-inflicted harms without the exercise of federal judicial power.

Simply put, a federal suit is over once the plaintiff has failed to show a non-conjectural and imminent injury *from the defendant's* challenged actions. It is irrelevant whether the plaintiff also decides to impose other harms upon himself. Such self-inflicted damage adds nothing to the proper analysis. There is no sound basis for treating plaintiffs who decide to inflict harms upon themselves any differently than similarly situated plaintiffs who do not. Both will have (or lack) Article III standing based on the presence (or absence) of a non-conjectural and imminent injury from the defendant's challenged conduct. Any contrary rule, as Judge Raggi explained, would erroneously permit litigants to manufacture Article III standing "for the price of a plane ticket." Pet. App. 148a.

b. The fact that respondents assert that they have altered their behavior because they genuinely "fear" the

possibility that their communications will be incidentally acquired by Section 1881a-authorized surveillance targeting others likewise does not establish Article III jurisdiction. A plaintiff's decision to curtail his own conduct to avoid a future injury that he fears reflects nothing more than a "subjective chill." And "in order to have standing, an individual must present more than 'allegations of a subjective "chill."' There must be a 'claim of specific present objective harm or a threat of specific future harm.'" *Bigelow* v. *Virginia*, 421 U.S. 809, 816-817 (1975) (quoting *Laird*, 408 U.S. at 13-14) (brackets omitted). In other words, respondents' inability to show a non-conjectural and imminent interception of their communications cannot be cured by relying on an asserted chilling effect resulting from their own fear of such surveillance.

That conclusion flows directly from *Laird* v. *Tatum*. In *Laird*, this Court held that plaintiffs who allegedly sustained self-inflicted harms by curtailing their own First Amendment activity lacked Article III standing to challenge an Army domestic surveillance program that they claimed produced that "'chilling' effect." 408 U.S. at 3. "[M]ost if not all" of the plaintiffs established that they had "been the subject of Army surveillance reports," *id.* at 39 (Brennan, J., dissenting) (quoting court of appeals' decision in *Laird*), and the Army's domestic surveillance program's "alleged 'chilling' effect" arose, *inter alia*, from the plaintiffs' "apprehensiveness that the Army may at some future date * * * direct[ly] harm" them by using information from the program. *Laird*, 408 U.S. at 13. The Court determined that the plaintiffs' fear-induced self-inflicted harms were insufficient to establish Article III standing, because such "[a]llegations of a subjective 'chill' are not an adequate

substitute for a claim of * * * a threat of specific future harm." *Id.* at 13-14; see *id.* at 15 ("immediately threatened injury" is required).

As the D.C. Circuit explained in an opinion authored by then-Judge Scalia, *Laird* requires that a plaintiff show that he has "suffered some concrete harm (past or immediately threatened) apart from the 'chill' itself." *United Presbyterian Church*, 738 F.2d at 1378; see *id.* at 1380. The plaintiffs in *United Presbyterian Church*, who sought to challenge the legality of Executive Order No. 12,333, asserted that they had already "been subjected to unlawful surveillance in the past"; argued that "their activities are such that they are especially likely to be targets of the unlawful activities authorized by the order"; and alleged that they had curtailed constitutionally protected activities because of "fear" that they would be "targeted for surveillance" in the future. *Id.* at 1377, 1380-1381. But the D.C. Circuit held that the plaintiffs failed to establish standing because, like respondents here, they failed to show the "imminence of concrete, harmful action" that might result from surveillance activities governed by that Order. *Id.* at 1380. The D.C. Circuit further held that their allegation of self-imposed injury was insufficient, because a "[c]hilling effect" is itself not a "*harm* which entitles the plaintiff to [sue]." *Id.* at 1378. The same reasoning applies here. "*Laird* compels the conclusion * * * that [respondents] lack standing because any chilling of their electronic communications with foreign contacts, including costs incurred in forgoing such communications, arose 'merely' from their knowledge of the existence of a program that they feared could target their contacts." Pet. App. 152a (Raggi, J., dissenting).

The court of appeals attempted to distinguish *Laird* on the ground that respondents "detail specific, reasonable actions that they have taken to their own tangible, economic cost * * * to avoid being overheard in the way that the challenged statute makes reasonably likely." Pet. App. 54a. But there is no sound basis for concluding that self-inflicted economic harms are cognizable injuries in fact while self-inflicted injuries to constitutionally protected expressive conduct are not. Nor does characterizing a self-inflicted harm as a "reasonable action[]" escape *Laird*'s conclusion that self-inflicted injuries are by their nature insufficient: "Allegations of a subjective 'chill' are not an adequate substitute for a claim of * * * a threat of specific future harm." 408 U.S. at 13-14.

c. The court of appeals mistakenly relied on *Laidlaw*, *supra*, and *Meese* v. *Keene*, 481 U.S. 465 (1987), as support for its view that "alter[ing] or ceas[ing] conduct as a reasonable response to the challenged statute" will confer standing. Pet. App. 43a-46a. Neither decision stands for that proposition.

The "injury in fact" in *Laidlaw* was not the plaintiffs' cessation of activities based on a fear of yet-to-be-taken conduct; it was damage to an area's "aesthetic and recreational value[]" to the plaintiffs, where it was "*undisputed* that Laidlaw's unlawful *conduct*—discharging pollutants [into the water]—was occurring." *Laidlaw*, 528 U.S. at 183-184 (citation omitted; emphasis added). The Court was careful to explain that its precedents recognized harm to "'aesthetic and recreational values'" as a cognizable "injury in fact" for standing purposes. *Id.* at 183 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972), and citing *Defenders of Wildlife*, 504 U.S. at 562-563). Evidence showing that recreation

was reasonably curtailed and that the river "looked and smelled polluted" thus served to document the extent of the injury to those "recreational" and "aesthetic" interests. See *id.* at 181-184; cf. *id.* at 182-183, 184 (additionally noting an economic injury in the form of reduced property value).

Similarly, in *Keene*, the government had already determined that three specific films Keene wanted to display had to be labeled as foreign "political propaganda." *Keene*, 481 U.S. at 467 & n.1. Keene sought "to enjoin the application of the [labeling statute] to these three films," and he proved (with "detailed affidavits") that the government-required label would cause him actual, "reputation[al]" injury for displaying the films. *Id.* at 468, 473-474 & n.7. That reputational injury from *proven* government conduct "demonstrated *more than* a 'subjective chill.'" *Id.* at 473 (emphasis added).[14]

Because *Laidlaw* and *Keene* involved concrete, proven conduct by the defendants and specific injuries other than a "chill" that might flowed from that conduct, they do not suggest that self-inflicted harms are cognizable as Article III injuries in fact. And because respondents' ongoing decision voluntarily to incur economic costs and alter their communication practices does not constitute an injury in fact, respondents have failed to

---

[14] Respondents have argued (Br. in Opp. 22-23) that *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) *(SCRAP)*, found standing based on a plaintiff's self-imposed injury. But *SCRAP* based standing on the allegation that individuals' ongoing recreational *use* of natural resources would be less enjoyable. *Id.* at 678, 685, 688. The "asserted injury" in *SCRAP* thus was that "specific and perceptible harms—depletion of natural resources and increased littering—would befall [the plaintiff's] members imminently if the [agency] orders were not reversed." *Whitmore*, 495 U.S. at 159 (discussing *SCRAP*).

establish their standing on the basis of that asserted "present injury."

2. Respondents Failed To Establish That Their Asserted Ongoing Injuries Would Likely Be Redressed By An Injunction

Even if Article III standing could be built on a plaintiff's own self-inflicted harms, a plaintiff who proves a cognizable injury in fact must additionally demonstrate that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Defenders of Wildlife*, 504 U.S. at 561 (citation omitted). The court of appeals erred in finding a "substantial likelihood that the requested relief will remedy" respondents' self-imposed fiscal and other chilling "injuries." Pet. App. 41a n.24 (citation omitted). The court reasoned that, because "[respondents'] injuries stem from their reasonable fear of being monitored by FAA-authorized government surveillance," the injuries would be redressed by an "injunction prohibiting the government from conducting surveillance under the FAA." *Ibid.* That approach to redressability is incorrect and again highlights the highly speculative nature of respondents' standing contentions.

Respondents' claimed ongoing, present injuries are self-imposed ones that respondents contend are reasonable reactions to reasonable fears. But a court order is not needed to redress any such self-inflicted "injury." Respondents can stop expending funds now. Moreover, even if respondents were to obtain an injunction prohibiting acquisitions under Section 1881a, they have failed to show that it is likely—as opposed to speculative—that the relief would stop their perceived need for their expenditures and self-inflicted harms.

the government may indirectly obtain information from foreign intelligence agencies, the overseas activities of which are not governed by the United States Constitution or federal law.

Beyond that, as respondents describe them, respondents' international contacts could be "prime targets for surveillance by other countries, including their own." Pet. App. 172a (Raggi, J., dissenting). Respondents' surveillance-based fears thus would appear to extend beyond intelligence obtained by or provided to the United States. See, *e.g.*, Pet. App. 344a (noting communications with groups that are "targeted by their own governments"), 361a (noting contacts' fears that their communications "could be monitored by the Cuban government").

Given the alternative means of collecting the contents of communications of non-United States persons abroad, it is wholly speculative whether an injunction halting only Section 1881a-authorized surveillance would redress respondents' asserted injuries. Indeed, respondents' claim to redressability is particularly weak because their self-imposed injuries appear to depend not simply on their own subjective fears of surveillance, but also on their foreign contacts' fears, which might not be diminished sufficiently by a favorable ruling. See, *e.g.*, Pet. App. 344a, 353a, 357a-358a, 361a, 366a-367a. Where, as here, redressability hinges on the responses of "third part[ies]" to "government action or inaction," standing is generally "substantially more difficult to establish." *Defenders of Wildlife*, 504 U.S. at 562 (internal quotation marks omitted). And because "'courts cannot presume either to control or to predict'" the "'unfettered choices made by independent actors not before the courts,'" it was respondents' burden "to adduce facts

Respondents' showing of redressibility is speculative because, even though respondents' asserted self-imposed injuries flow from their fear (and the purported fears of their foreign contacts) "that their communications are being monitored by the United States," see, *e.g.*, Pet. App. 338a, 344a-345a, 351a-352a, 361a, 366a, they have not sought to enjoin all possible government surveillance of their contacts abroad. Respondents instead have requested an injunction that would stop only "surveillance [conducted] pursuant to the authority granted by section [1881a]." Pet. App. 241a. That focus on just one provision governing foreign-intelligence surveillance undermines their claim to redressability: "[I]f the United States intelligence community is as inclined to monitor [respondents' foreign contacts'] communications as [respondents] assert, then enjoining the FAA will merely eliminate one of several means for achieving that objective." *Id.* at 169a (Raggi, J., dissenting); see *id.* at 168a-173a.

The government may conduct foreign-intelligence-collection activities targeting non-United States persons abroad in multiple ways. See pp. 32-33, *supra*. "Electronic surveillance" conducted under traditional FISA orders is available if there is probable cause to believe the target is a "foreign power" or agent thereof, 50 U.S.C. 1805(a), which includes foreign governments, entities directed and controlled by foreign governments, certain foreign-based political organizations, international terrorist groups, and international proliferators of weapons of mass destruction. The government also may target non-United States persons abroad for foreign-intelligence collection of wire and wireless communications outside of the United States under Executive Order No. 12,333. See pp. 32-33 & n.12, *supra*. And

showing that those choices have been or will be made in such manner as to * * * permit redressability." *Ibid.* (quoting *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)). Respondents have produced no facts to carry that burden.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT S. LITT
General Counsel
TRICIA S. WELLMAN
Deputy General Counsel
BRADLEY A. BROOKER
Associate General Counsel
Office of the Director of National Intelligence
RAJESH DE
General Counsel
ARIANE E. CERLENKO
Associate General Counsel
National Security Agency

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DOUGLAS N. LETTER
THOMAS M. BONDY
DANIEL J. LENERZ
HENRY C. WHITAKER
Attorneys

JULY 2012

RESPONDENT'S BRIEF

RECORD
BRIEFS

No. 11-1025

SEP 17 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES R. CLAPPER, JR.,
DIRECTOR OF NATIONAL INTELLIGENCE, ET AL.,

Petitioners,

—v.—

AMNESTY INTERNATIONAL USA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Charles S. Sims
Matthew J. Morris
Proskauer Rose LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

Jameel Jaffer
Counsel of Record
Steven R. Shapiro
Alexander A. Abdo
Mitra Ebadolahi
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
jjaffer@aclu.org

Arthur N. Eisenburg
Christopher T. Dunn
New York Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 607-3300

Blank Rome LLP

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the corporate disclosure statement included in the Brief in Opposition, BIO at ii, is incorporated by reference.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 1

I. The Foreign Intelligence Surveillance Act 1

II. The Bush Administration's Warrantless Surveillance Program 5

III. The FISA Amendments Act of 2008 7

IV. The Record Below 14

V. Procedural History 21

SUMMARY OF ARGUMENT 23

ARGUMENT 27

I. PLAINTIFFS HAVE STANDING BECAUSE THE FAA CAUSES THEM ACTUAL AND ONGOING INJURIES THAT WOULD BE REDRESSED BY A FAVORABLE DECISION 28

A. Plaintiffs are suffering actual injuries that are fairly traceable to the FAA 28

B. Plaintiffs' actual injuries are neither "self-inflicted" nor "subjective." 36

1. Plaintiffs' actual injuries are not "self-inflicted." 36

2. Plaintiffs' actual injuries are not "subjective." 45

C. Plaintiffs' actual and ongoing injuries would be redressed by a favorable judgment. 48

II. PLAINTIFFS HAVE STANDING BECAUSE SURVEILLANCE OF THEIR COMMUNICATIONS UNDER THE FAA IS "IMMINENT." 53

CONCLUSION 61

TABLE OF AUTHORITIES

CASES

ACLU v. Nat'l Sec. Agency, 493 F.3d 644 (6th Cir. 2007) 47

Adarand Constructors v. Pena, 515 U.S. 200 (1995) 55

Allen v. Wright, 468 U.S. 737 (1984) 27, 60

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) 22, 56

Berger v. New York, 388 U.S. 41 (1967) 59

Blum v. Yaretsky, 457 U.S. 991 (1982) 55

Camreta v. Greene, 131 S. Ct. 2020 (2011) 41, 54

Clark v. Library of Cong., 750 F.2d 89 (D.C. Cir. 1984) 47

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 28

Davis v. FEC, 554 U.S. 724 (2008) 15

Duke Power Co. Carolina Envtl. Study Grp., 438 U.S. 59 (1978) ..... *passim*

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) ..... *passim*

In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008, No. Misc. 08-01 (FISA Ct. Aug. 27, 2008) 13

In re Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002) 5

Initiative & Referendum Inst. v. Walker, 450 F.3d 1082 (10th Cir. 2006) 47

Laird v. Tatum, 408 U.S. 1 (1972) .....*passim*

Larson v. Valente, 456 U.S. 228 (1982) 49

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 27, 60

Massachusetts v. EPA, 549 U.S. 497 (2007).....*passim*

Meese v. Keene, 481 U.S. 465 (1987).....*passim*

Monsanto Co. v. Geertson Seed Farms,
130 S. Ct. 2743 (2010) .....*passim*

Ozonoff v. Berzak, 744 F.2d 224 (1st Cir. 1984) 47

Pennell v. City of San Jose, 485 U.S. 1 (1988) 55

Pennsylvania v. West Virginia,
262 U.S. 553 (1923) 56

Presbyterian Church v. United States,
870 F.2d 518 (9th Cir. 1989) 47

Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47 (2006) 14

Smith v. Meese, 821 F.2d 1484 (11th Cir. 1987) 47

Socialist Workers Party v. Att'y Gen.,
419 U.S. 1314 (1974) 47

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 56

United Presbyterian Church v. Reagan,
738 F.2d 1375 (1984) 47

United States v. Cavanagh, 807 F.2d 787
(9th Cir. 1987) 5

United States v. Duggan,
743 F.2d 59 (2d Cir. 1984) 5

United States v. Khan, No. 1:11-cr-20331 (S.D. Fla. Mar. 14, 2012) 58

United States v. Pelton, 835 F.2d 1067 (4th Cir. 1987) 5

United States v. U.S. Dist. Court (Keith), 407 U.S. 297 (1972) 4, 58, 59

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 28, 60

Virginia v. Am. Booksellers Ass'n, 484 U.S. 383 (1988) 55

Whitmore v. Arkansas, 495 U.S. 149 (1990) 55, 56

Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012) 28

CONSTITUTION, STATUTES & RULES

U.S. Const. amend. I 14, 45, 47, 59

U.S. Const. amend. IV 9, 13, 14, 59

FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 .....*passim*

Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801 *et seq.*) .....*passim*

50 U.S.C. § 1801(e) 9

50 U.S.C. § 1801(f)(2) 3

50 U.S.C. § 1801(h) 8

50 U.S.C. § 1801(h)(1) 12

50 U.S.C. § 1801(i) 7

50 U.S.C. § 1803(a) 3

50 U.S.C. § 1804(a) 4
50 U.S.C. § 1804(a)(5) 10
50 U.S.C. § 1805(a)(2)(A) 4
50 U.S.C. § 1805(a)(2)(B) 4
50 U.S.C. § 1805(c)(1)(C) 10
50 U.S.C. § 1805(d)(3) 4
50 U.S.C. § 1806(c) 58
50 U.S.C. § 1821(4) 8
50 U.S.C. § 1821(4)(A) 12
50 U.S.C. § 1881a ..... *passim*
50 U.S.C. § 1881a(a) 8
50 U.S.C. § 1881a(b) 8, 9
50 U.S.C. § 1881a(b)(2) 10
50 U.S.C. § 1881a(g)(2)(A)(i) 8
50 U.S.C. § 1881a(g)(2)(A)(ii) 8
50 U.S.C. § 1881a(g)(2)(A)(iii)–(vii) 9
50 U.S.C. § 1881a(g)(2)(A)(v) 10, 30
50 U.S.C. § 1881a(g)(4) 9
50 U.S.C. § 1881e(a) 58
Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. § 2510 *et seq.* 4
18 U.S.C. § 2518(8) 57
Protect America Act, Pub. L. No. 110-55, 121 Stat. 552 (2007) 7
Model Rules of Prof'l Conduct R. 1.6 ..... 34, 35

ADMINISTRATIVE & LEGISLATIVE MATERIALS

154 Cong. Rec. H5743 (June 20, 2008) (statement of Rep. Robert Scott) 31

154 Cong. Rec. H5770 (June 20, 2008) (statement of Rep. Speier) 32

154 Cong. Rec. S568 (Feb. 4, 2008) (statement of Sen. Feingold) 12, 31

154 Cong. Rec. S574 (Feb. 4, 2008) (statement of Sen. Cardin) 59

Final Report of the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (Book II), S. Rep. No. 94-755 (1976) 2, 26

FISA for the 21st Century, Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Michael Hayden) 10, 11, 32

Office of the Inspector Gen. of the Dep't of Def. et al., Unclassified Report on the President's Surveillance Program (2009) 5, 6

OTHER AUTHORITIES

13A Charles Alan Wright et al., Federal Practice and Procedure (3d ed. 2011) 36

ABA Report 105A (Aug. 2012), *available at* http://bit.ly/QnDFG4 35

David Kris & J. Douglas Wilson, National Security Investigations & Prosecutions (2012) 9, 10

David Kris, A Guide to the New FISA Bill, Part I, June 21, 2008, *available at* http://balkin.blogspot.com/2008/06/guide-to-new-fisa-bill-part-i.html 32

Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, Apr. 16, 2009 10

Letter from Att'y Gen. Michael Mukasey to Hon. Harry Reid, Majority Leader, U.S. Senate (Feb. 5, 2008) 12, 31, 32, 33

Letter from the Dep't of Justice to the ACLU (Nov. 29, 2010) 13, 14

Letter from the Office of the Dir. of Nat'l Intelligence to Senators Wyden and Udall (July 26, 2011) 14

INTRODUCTION

This case involves a constitutional challenge to the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA" or "Act"), a statute that invested the government with sweeping new authority to collect Americans' international communications from telecommunications switches and other facilities inside the United States. The Act permits the government to collect these communications *en masse*—without having to demonstrate or even assert to any court that any party to any of the communications is a terrorist, an agent of a foreign power, or a suspected criminal.

Plaintiffs are lawyers, journalists, human rights researchers, and others whose communications are very likely to be monitored under the Act and who, in reasonable response to the substantial risk of surveillance under the FAA, and in order to comply with rules of professional conduct, have been compelled to take costly and burdensome measures to protect the confidentiality of information that is sensitive or privileged. The court of appeals held that, because the risk of surveillance is real, and because plaintiffs' response to it is entirely reasonable, plaintiffs have standing to challenge the Act. That decision was correct, and this Court should affirm.

STATEMENT

I. The Foreign Intelligence Surveillance Act

In 1975, Congress established a committee, chaired by Senator Frank Church, to investigate allegations of "substantial wrongdoing" by the federal intelligence agencies in their conduct of

surveillance. Final Report of the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (Book II), S. Rep. No. 94-755, at v (1976) ("Church Report"). The committee discovered that, over the course of four decades, the intelligence agencies had "violated specific statutory prohibitions," "infringed the constitutional rights of American citizens," and "intentionally disregarded" legal limitations on surveillance in the name of "national security." *Id.* at 137.

Of particular concern to the committee was that the agencies had "pursued a 'vacuum cleaner' approach to intelligence collection," *id.* at 165, in some cases intercepting Americans' communications under the pretext of targeting foreigners. In one operation, for example, the National Security Agency ("NSA") used a program nominally targeted at foreigners to "obtain[] from at least two cable companies essentially all cables to or from the United States, including millions of the private communications of Americans." *Id.* at 104. In another, the NSA monitored thousands of phone calls between New York City and a city in South America. *Id.* at 161–62. The committee attributed the systemic constitutional violations it uncovered to a failure in the system of checks and balances. *Id.* at 289. To ensure proper judicial involvement in the protection of Americans' communications, the committee recommended that all surveillance of communications "to, from, or about an American without his consent" be subject to a judicial warrant procedure. *Id.* at 309.

Largely in response to the Church Report, Congress enacted the Foreign Intelligence

Surveillance Act of 1978 ("FISA"), Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801 *et seq.*). The statute created the Foreign Intelligence Surveillance Court ("FISA Court") and empowered it to grant or deny government applications for surveillance orders in foreign intelligence investigations. *See* 50 U.S.C. § 1803(a). In its current form, FISA regulates "electronic surveillance," defined to include:

> the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States.

Id. § 1801(f)(2).

Before passage of the FAA in 2008, FISA generally foreclosed the government from engaging in electronic surveillance without first obtaining an individualized and particularized order from the FISA Court. To obtain an order, the government was required to submit an application that: identified or described the target of the surveillance; explained the government's basis for believing that "the target of the electronic surveillance [was] a foreign power or an agent of a foreign power"; explained the government's basis for believing that "each of the facilities or places at which the electronic surveillance [was] directed [was] being used, or [was] about to be used, by a foreign power or an agent of a foreign power"; described the procedures the government would use to "minimiz[e]" the acquisition, retention, and dissemination of non-

publicly available information concerning U.S. persons; described the nature of the foreign intelligence information sought and the type of communications that would be subject to surveillance; and certified that a "significant purpose" of the surveillance was to obtain "foreign intelligence information." *Id.* § 1804(a).

The FISA Court could issue such an order only if it found, among other things, that there was "probable cause to believe that the target of the electronic surveillance [was] a foreign power or an agent of a foreign power," *id.* § 1805(a)(2)(A), and that "each of the facilities or places at which the electronic surveillance [was] directed [was] being used, or [was] about to be used, by a foreign power or an agent of a foreign power," *id.* § 1805(a)(2)(B). The FISA Court had express authority to "assess compliance with . . . minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated." *Id.* § 1805(d)(3).

This Court has never reviewed the constitutionality of FISA. It last addressed the constitutionality of intelligence surveillance in *United States v. U.S. District Court* (*Keith*), 407 U.S. 297, 323–24 (1972), which held unconstitutional the warrantless surveillance of Americans' communications for the purpose of domestic security. Lower courts that have reviewed FISA's constitutionality have observed that FISA's procedures are considerably more permissive than those of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, the

statute that governs surveillance in law enforcement investigations. These courts have upheld FISA, however, because of its probable cause requirements and its provision for judicial supervision of minimization. *See, e.g.*, *In re Sealed Case*, 310 F.3d 717, 737–41 (FISA Ct. Rev. 2002); *United States v. Duggan*, 743 F.2d 59, 72–74 (2d Cir. 1984); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987).

II. The Bush Administration's Warrantless Surveillance Program

In late 2001 or early 2002, President Bush secretly authorized the NSA to inaugurate a program of warrantless electronic surveillance inside the United States (the "Program"). Office of the Inspector Gen. of the Dep't of Def. et al., Unclassified Report on the President's Surveillance Program 1, 5–6 (2009) ("IG Report")[1]; Pet. App. 244a, 247a (Jaffer Decl. ¶ 3, Ex. A). President Bush publicly acknowledged the Program after *The New York Times* reported its existence in December 2005. IG Report 1, 29, 33, 36; Pet. App. 244a, 262a (Jaffer Decl. ¶ 4, Ex. B). The President reauthorized the Program repeatedly between 2001 and 2007. IG Report 6, 26, 30; Pet. App. 244a, 266a (Jaffer Decl. ¶ 5, Ex. C). According to public statements made by senior government officials, the Program involved the interception of emails and telephone calls that originated or terminated inside the United States. Pet. App. 244a–245a, 272a (Jaffer Decl. ¶ 6, Ex. D).

[1] The IG Report is available at http://1.usa.gov/RQ4qqZ.

The interceptions were not predicated on judicial warrants or any other form of judicial authorization; nor were they predicated on any determination of criminal or foreign intelligence probable cause. Instead, according to then-Attorney General Alberto Gonzales and then-NSA Director Michael Hayden, NSA "shift supervisors" initiated surveillance when in their judgment there was a "reasonable basis to conclude that one party to the communication [was] a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." IG Report 6, 15, 31; Pet. App. 244a–245a, 272a–314a (Jaffer Decl. ¶¶ 6–8, Exs. D–F).

On January 17, 2007, then-Attorney General Alberto Gonzales publicly announced that a judge of the FISA Court had effectively ratified the Program and that, consequently, "any electronic surveillance that was occurring as part of the [Program] will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." Pet. App. 245a, 312a (Jaffer Decl. ¶ 8, Ex. F); *see also* IG Report 30 (discussing transition of certain program activities from presidential authorization to FISA Court approval). The FISA Court orders issued in January 2007, however, were modified in the spring of that same year. The modifications reportedly narrowed the authority that the FISA Court had extended to the executive branch in January. Pet. App. 245a–246a, 315a (Jaffer Decl. ¶ 9, Ex. G). After these modifications, the administration pressed Congress to amend FISA in order to obtain what it described as important new and expanded surveillance authorities beyond what FISA had allowed for three decades.

III. The FISA Amendments Act of 2008

President Bush signed the FAA into law on July 10, 2008.[2] The Act substantially revised the FISA regime that had been in place since 1978 and authorized the acquisition without individualized suspicion of a wide swath of communications, including Americans' international communications, from telecommunications switches and other facilities inside the United States. As discussed below, the authority granted by the FAA is altogether different from and far more sweeping than the authority that the government has traditionally exercised under FISA, and the FAA's implications for Americans' constitutional rights are correspondingly far-reaching.[3]

Under the FAA, the Attorney General and Director of National Intelligence ("DNI") can "authorize jointly, for a period of up to 1 year . . . the targeting of persons reasonably believed to be located outside the United States to acquire foreign

---

[2] Congress passed a predecessor statute, the Protect America Act, on August 5, 2007. Pub. L. No. 110-55, 121 Stat. 552 (2007). The authorities provided by that Act expired, however, in February 2008.

[3] Throughout this brief, plaintiffs use the term "international" to describe communications that either originate or terminate (but not both) outside the United States. Plaintiffs use the term "Americans" to refer to "United States person[s]" as defined in 50 U.S.C. § 1801(i) (defining the term to include U.S. citizens, permanent residents, and certain corporations and unincorporated associations). Plaintiffs use the term "FISA" to refer to the provisions that govern traditional FISA surveillance as distinguished from the provisions that now govern surveillance under the FAA.

intelligence information." 50 U.S.C. § 1881a(a). To obtain an order under section 1881a, the Attorney General and DNI must provide to the FISA Court "a written certification and any supporting affidavit" attesting that the FISA Court has approved, or that the government has submitted to the FISA Court for approval, "targeting procedures" that are "reasonably designed" to ensure that the acquisition is "limited to targeting persons reasonably believed to be located outside the United States" and to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." *Id.* § 1881a(g)(2)(A)(i).[4]

The certification and supporting affidavit must also attest that the FISA Court has approved, or that the government has submitted to the FISA Court for approval, "minimization procedures" that meet the requirements of section 1801(h) or section 1821(4). *Id.* § 1881a(g)(2)(A)(ii). Finally, the certification and supporting affidavit must attest that the Attorney General has adopted "guidelines" to ensure compliance with the limitations set out in section 1881a(b); that the targeting procedures, minimization procedures, and guidelines are

---

[4] The FAA prohibits the government from targeting Americans for electronic surveillance without obtaining individualized orders from the FISA Court. 50 U.S.C. § 1881a(b). This suit concerns not the targeting of Americans for electronic surveillance but the dragnet collection of Americans' international communications in the course of surveillance targeted at non-Americans outside the United States.

consistent with the Fourth Amendment; and that "a significant purpose" of the acquisition is "to obtain foreign intelligence information." *Id.* § 1881a(g)(2)(A)(iii)–(vii). The phrase "foreign intelligence information" is defined broadly to include, among other things, information concerning terrorism, national defense, and foreign affairs. *Id.* § 1801(e).

One crucial difference between the FAA and traditional FISA is that the FAA authorizes surveillance that is not predicated on probable cause or even individualized suspicion. Obtaining an order under section 1881a does not require the government to demonstrate to the FISA Court that its surveillance targets are terrorists, agents of foreign powers, or suspected criminals. Indeed, it does not require the government to identify its surveillance targets at all. *See* David Kris & J. Douglas Wilson, National Security Investigations & Prosecutions § 17.3, 602 (2012) ("For non-U.S. person targets, there is no probable-cause requirement; the only thing that matters is the government's reasonable belief about the target's location." (internal parentheses omitted)).

Of equal significance, the statute provides that the government is not required to identify the facilities, telephone lines, email addresses, places, premises, or property at which its surveillance will be directed, 50 U.S.C. § 1881a(g)(4), which means that the government can "direct surveillance . . . at various facilities without obtaining a separate authorization for each one," Kris & Wilson § 17.3, 602, and that it can direct its surveillance at "gateway" switches, through which flow the

communications of millions of people, rather than at individual telephone lines or email addresses, *id.* § 16.12, 577 (discussing probable operation of the Program).

Still another important difference between FISA and the FAA is that the FAA's "significant purpose" requirement—the requirement that a significant purpose of the government's surveillance be to gather foreign intelligence—attaches to entire *programs* of surveillance, not (as under FISA) to the surveillance of specific targets and facilities. *Compare* 50 U.S.C. §§ 1804(a)(5), 1805(c)(1)(C), *with id.* § 1881a(g)(2)(A)(v).

By dispensing with FISA's principal limitations, the FAA exposes *every* international communication—that is, every communication between an individual in the United States and a non-American abroad—to the risk of surveillance.[5] The government can once again conduct the kind of

---

[5] Because the predicate for surveillance under section 1881a is the government's "reasonabl[e] belie[f]" that the target is a non-U.S. person outside the United States, 50 U.S.C. § 1881a(b)(2), and because it is often difficult to determine the location of a party to any given communication, *see, e.g.*, FISA for the 21st Century, Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Michael Hayden) ("Hayden Testimony"), surveillance under the FAA will inevitably sweep up Americans' purely domestic communications as well. *See* Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, Apr. 16, 2009, *available at* http://nyti.ms/O2OeSP ("The National Security Agency intercepted private e-mail messages and phone calls of Americans in recent months on a scale that went beyond the broad legal limits established by Congress last year, government officials said in recent interviews.").

vacuum-cleaner-style surveillance that the Church Committee found so troubling. A single section 1881a order may be used to monitor the communications of thousands or even millions of Americans over the course of an entire year. It could authorize the acquisition of all communications to and from specific geographic areas of foreign policy interest—for example Russia, Iran, or Israel—including communications to and from U.S. citizens and residents. It could authorize the acquisition of all communications of European attorneys who work with American attorneys on behalf of prisoners held at Guantánamo Bay. On the theory that the surveillance is targeted at a terrorist organization outside the United States, it could authorize the wholesale collection of millions of communications, including Americans' international communications, from gateway switches in the United States.

Indeed, the dragnet surveillance of Americans' international communications was one of the purposes of the Act. In advocating changes to FISA, the executive made clear that its aim was to enable broader surveillance of communications between individuals inside the United States and non-Americans abroad. *See* Hayden Testimony (stating, in debate preceding passage of FAA's predecessor statute, that certain communications "with one end in the United States" are the ones "that are most important to us"). Moreover, in advocating for the FAA, executive officials expressly sought the authority to engage in dragnet rather than individualized surveillance. *See, e.g.*, Letter from Att'y Gen. Michael Mukasey to Hon. Harry Reid, Majority Leader, U.S. Senate 4 (Feb. 5, 2008), *available at* http://1.usa.gov/O2RQ7m ("Mukasey

Letter") (arguing that the intelligence community should be permitted to target "a geographic area abroad").[6]

To the extent the FAA provides safeguards for Americans' constitutional rights, the safeguards take the form of "minimization procedures," which must be "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." 50 U.S.C. §§ 1801(h)(1), 1821(4)(A). The minimization requirement, however, is weak. The Act does not prescribe specific minimization procedures; it does not give the FISA Court the authority to monitor compliance with minimization procedures; and it specifically allows the government to retain and disseminate information—including information relating to U.S. citizens and residents—if the government concludes that it is "foreign intelligence information." *Id.* § 1881a(e).

The oversight role of the FISA Court is also weak. As the FISA Court itself has acknowledged, its role in authorizing and supervising FAA

---

[6] Notably, insofar as the FAA permits dragnet surveillance, the Act is broader than the Bush Administration's warrantless wiretapping program is known to have been. 154 Cong. Rec. S568 (Feb. 4, 2008) (statement of Sen. Feingold) ("Even the administration's illegal warrantless wiretapping program, as described when it was publicly confirmed in 2005, at least focused on particular al-Qaida terrorists. But what we are talking about now is different. This is the authority to conduct a huge dragnet that will sweep up innocent Americans at home, combined with an utter lack of oversight mechanisms to prevent abuse.").

surveillance is "narrowly circumscribed." *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01, slip op. at 3 (FISA Ct. Aug. 27, 2008) (internal quotation marks omitted).[7] The judiciary's traditional function under the Fourth Amendment is to serve as a gatekeeper for particular acts of surveillance, but its function under the FAA is simply to issue advisory opinions blessing in advance the vaguest of parameters under which the government is then free to conduct surveillance for up to one year. The FISA Court does not consider individualized and particularized surveillance applications, does not make individualized probable cause determinations, and, as noted above, may not monitor compliance with targeting and minimization procedures. The role that the FISA Court plays under the FAA bears no resemblance to the role that it has traditionally played under FISA.[8]

---

[7] This opinion is available at http://www.aclu.org/pdfs/safefree/fisc_decision.pdf.

[8] Since oral argument before the Second Circuit, the government has released several hundred pages of documents under the Freedom of Information Act confirming that it is in fact using the FAA. *See* Letter from the Dep't of Justice to the ACLU (Nov. 29, 2010), *available at* http://www.aclu.org/national-security/faa-foia-documents. Recent statements by the intelligence community confirm that the FAA has been used to collect Americans' international communications. *See, e.g.*, Letter from the Office of the Dir. of Nat'l Intelligence to Senators Wyden and Udall (July 26, 2011), *available at* http://1.usa.gov/RQ4Z4b (stating that "it is not reasonably possible to identify the number of people located in the United States whose communications may have been reviewed under the authority of the FAA").

IV. The Record Below

Plaintiffs commenced this action on July 10, 2008, contending that the FAA unconstitutionally impaired their privacy and free speech rights. Plaintiffs alleged, in particular, that the statute violated the First and Fourth Amendments, as well as Article III and the principle of separation of powers, by authorizing the government to conduct sweeping, suspicionless, and warrantless surveillance of Americans' international communications.[9] Plaintiffs sought a declaration that the law is unconstitutional and an order enjoining its use.

Plaintiffs moved for summary judgment and submitted nine declarations, including two expert declarations, in support of their motion.[10] These included: (1) an affidavit from attorney plaintiff Scott McKay on behalf of himself and his law partner attorney plaintiff David Nevin; (2) an affidavit from attorney plaintiff Sylvia Royce; (3) an affidavit from human rights researcher Joanne Mariner, on behalf of plaintiff Human Rights Watch ("HRW"); (4) an affidavit from human rights researcher John Walsh, on behalf of plaintiff Washington Office on Latin

---

[9] Plaintiffs alleged that the FAA violates Article III by requiring the FISA Court to adjudicate the constitutionality not of specific searches but of programmatic rules that will govern sweeping surveillance programs.

[10] Not all plaintiffs filed affidavits in the district court, *see* Gov't Br. 30 n.10, but "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 52 n.2 (2006).

America ("WOLA"); (5) an affidavit from journalist Chris Hedges, on behalf of plaintiff *The Nation* magazine; and (6) an affidavit from journalist Naomi Klein, also on behalf of *The Nation* magazine.[11]

The government opposed plaintiffs' motion and cross-moved for summary judgment, but without submitting any evidence. Pet. App. 17a. At oral argument in the district court, the government expressly stated that it was accepting the facts asserted by plaintiffs as true for purposes of summary judgment. Pet. App. 77a. The factual record before this Court is therefore uncontroverted.

Plaintiffs are attorneys and human rights, labor, legal, and media organizations whose work

---

[11] Plaintiffs' declarations were filed four years ago, and some of the assertions in them are now superseded. For example, the declaration of Scott McKay states that Mr. McKay and plaintiff David Nevin represented Khalid Sheik Mohammed, a prisoner who has been charged with capital offenses before the military commissions at Guantánamo Bay. Mr. Nevin's representation of Mr. Mohammed continues, but since 2008 Mr. McKay's representation of Mr. Mohammed has ceased. Similarly, plaintiff Sylvia Royce declared in 2008 that she represented a prisoner held at Guantánamo Bay; while she continues to represent individuals held in the custody of the U.S. military overseas, she no longer represents the prisoner whom she represented in 2008. Joanne Mariner no longer works for plaintiff HRW, but HRW continues to engage in the same kinds of work that Ms. Mariner described in her 2008 declaration. Plaintiffs' central allegations remain true, and plaintiffs' claim to standing remains essentially the same as it was in 2008. Because "the standing inquiry "focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed," *Davis v. FEC*, 554 U.S. 724, 734 (2008), the facts recited here are taken from the declarations filed in 2008.

requires them to engage in sensitive and sometimes privileged telephone and email communications with colleagues, clients, journalistic sources, witnesses, experts, and victims of human rights abuses located outside the United States. Because of the scope of the challenged law, the nature of their communications, and the identities and geographic locations of their contacts, plaintiffs reasonably believe that their confidential communications will be acquired, analyzed, retained, and disseminated under the FAA.

All plaintiffs exchange information that constitutes "foreign intelligence information" within the meaning of the FAA—that is, all plaintiffs communicate precisely the kind of information that the statute authorizes the government to collect. Pet. App. 370a–374a (McKay Decl. ¶¶ 5, 7, 12) (communications related to representation of accused terrorists); Pet. App. 352a–353a (Royce Decl. ¶ 8) (communications with relatives of Guantánamo Bay detainees); Pet. App. 343a–344a (Mariner Decl. ¶ 8) (HRW's communications with victims of extraordinary rendition); Pet. App. 356a–361a (Walsh Decl. ¶¶ 5–6, 8–9, 11) (WOLA's communications with dissidents in Latin America); Pet. App. 337a (Klein Decl. ¶ 6) (communications with indigenous rights advocates in Argentina); Pet. App. 366a (Hedges Decl. ¶ 7) (communications with sources throughout the Middle East).

Some plaintiffs communicate by telephone and email with people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Pet. App. 343a–344a (Mariner Decl. ¶ 8) (HRW

communications with people in the Middle East, North Africa, Central Asia, and South Asia); Pet. App. 356a–357a, 361a (Walsh Decl. ¶¶ 5, 11) (WOLA communications with people in Colombia, Cuba, and Venezuela); Pet. App. 365a–366a (Hedges Decl. ¶¶ 4, 7) (communications with people in Iran, Syria, and Libya).

Some plaintiffs communicate with attorneys or co-counsel overseas. Pet. App. 351a (Royce Decl. ¶ 6) (communications with co-counsel in Mauritania and France); Pet. App. 343a (Mariner Decl. ¶ 7).

Some plaintiffs communicate by telephone and email with the family members of individuals who have been detained by the U.S. military or CIA. Pet. App. 350a (Royce Decl. ¶ 5) (communications with client's brother, Yahdih Salahi, a university student in Germany); Pet. App. 343a (Mariner Decl. ¶ 7).

Some plaintiffs communicate by telephone and email with political dissidents and human rights activists abroad. Pet. App. 337a (Klein Decl. ¶¶ 6–7) (communications with foreign activists in Colombia and the Philippines); Pet. App. 357a (Walsh Decl. ¶ 6) (WOLA communications with leaders of protest movements in El Salvador).

Some plaintiffs communicate by telephone and email with foreign journalists, researchers, and other experts overseas. Pet. App. 343a (Mariner Decl. ¶ 7) (HRW communications with researchers, lawyers, former detainees, activists, translators, and others); Pet. App. 358a (Walsh Decl. ¶ 8) (communications with Colombian scientific experts).

The FAA disrupts plaintiffs' ability to engage in confidential communications that are integral to

their professional activities. It compromises their ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and engage in other legitimate and constitutionally protected communications. Pet. App. 345a (Mariner Decl. ¶ 10) ("Many of the people with whom I communicate will not share information with me if they believe that by sharing information with me they are also sharing information with the U.S. government."); Pet. App. 359a–362a (Walsh Decl. ¶¶ 9–13); Pet. App. 338a (Klein Decl. ¶ 9); Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 373a (McKay Decl. ¶ 11); *see also* Pet. App. 381a–382a, 386a–387a (Gillers Decl. ¶¶ 10, 12, 23).

The FAA has particularly serious implications for those plaintiffs who are attorneys. Plaintiff Sylvia Royce explained:

> The risk that the government will monitor my communications with co-counsel puts me in a dilemma: I would like to have an open exchange of views on legal strategy with my co-counsel, but I have a duty not to allow client confidences and legal strategy to be captured by persons outside the attorney-client relationship, and least of all by the U.S. government, which in this case is the opposing party.

Pet. App 351a–352a (Royce Decl. ¶ 7); *see also* Pet. App. 371a–372a (McKay Decl. ¶ 8); Pet. App. 381a–387a (Gillers Decl. ¶¶ 10–23).

The challenged law has compelled plaintiffs to take costly and burdensome measures to protect the

confidentiality of sensitive and privileged communications. Pet. App. 371a–373a, 375a (McKay Decl. ¶¶ 8, 10–11, 14); Pet. App. 338a (Klein Decl. ¶ 9); Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9).

Some plaintiffs have forgone communications that are particularly sensitive. Pet. App. 372a–373a (McKay Decl. ¶ 10) ("[W]e are faced with a choice between asking experts, investigators or witnesses to share sensitive information over the phone or by e-mail or, alternatively, forgoing the information altogether. This has a real effect on our ability to represent our clients."); Pet. App. 352a–353a (Royce Decl. ¶ 8); Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9).

Some plaintiffs have traveled overseas to gather information that they would otherwise have gathered by telephone or email. Pet. App. 338a (Klein Decl. ¶ 9); Pet. App. 351a–352a (Royce Decl. ¶ 7); Pet. App. 372a–373a (McKay Decl. ¶ 10); Pet. App. 345a (Mariner ¶ 10).

The record establishes that the measures plaintiffs have taken to protect the confidentiality of sensitive communications are not only reasonable but in some cases obligatory. For example, as explained in an expert declaration filed by Professor Gillers, a nationally known legal ethicist, rules of professional conduct prohibit lawyers from "divulg[ing] confidential information about a client over any vehicle of communication, including telephone, fax, and e-mail, if the lawyer does not have 'a reasonable expectation of privacy' in the use of the vehicle." Pet. App. 380a (Gillers Decl. ¶ 9). Professor Gillers described the dilemma this creates for the attorney plaintiffs in the following terms:

> Because of the status of their clients, the identity and location of witnesses and sources, and the breadth of the FAA authority, [the attorney plaintiffs] have good reason to believe that the persons abroad with whom they must communicate to satisfy their professional obligations will be or are targets of the authority granted the government under the FAA. . . . Under these circumstances, the lawyer plaintiffs have *an ethical obligation* to limit their telephonic and electronic communications with persons abroad to routine and non-sensitive information.

Pet. App. 383a–384a (Gillers Decl. ¶ 16) (emphasis added).

The burden imposed on plaintiffs by the FAA is different in degree and kind from the burden imposed by other surveillance. As attorney plaintiff McKay explained:

> [W]e now have to assume that every one of our international communications may be monitored by the government. With respect to every single international communication, we have to make an assessment of whether our client's interest would be compromised if the government were to acquire the communications. If the answer is yes, we have to forgo the communication altogether or find a way of collecting the information we need (or conveying the information we want to convey) in

person rather than by telephone or email.

Pet. App. 375a (McKay Decl. ¶ 14); Pet. App. 350a–351a (Royce Decl. ¶ 5); Pet. App. 356a–357a, 360a (Walsh Decl. ¶¶ 4, 5, 10); Pet. App. 336a–338a (Klein Decl. ¶¶ 5–6, 8–9); Pet. App. 365a–367a (Hedges Decl. ¶¶ 6–9); Pet. App. 345a–346a (Mariner Decl. ¶ 11) ("A risk that was previously limited to a subset of communications with a small subset of people is now a risk that we must evaluate and address every time we make an international telephone call or send an e-mail to an individual located abroad.").

In sum, undisputed record evidence establishes that plaintiffs reasonably fear that the FAA will be used to acquire their communications; that the statute already has compelled them to take costly and burdensome measures to protect the confidentiality of sensitive and privileged communications; and that the measures they have taken are not discretionary but rather are prudent, reasonable, and in some cases compulsory responses to the threat presented by the statute.

V. Procedural History

The government offered no evidence to contradict plaintiffs' Rule 56(c) submission, instead arguing that plaintiffs' evidence, even if true, was insufficient to satisfy Article III. The district court entered summary judgment for defendants, holding that plaintiffs lacked standing. Pet. App. 63a. The court held that plaintiffs had failed to establish an actual and well-founded fear of harm because they had not shown that they were "subject to" the statute they challenged. Pet. App. 96a–97a. The court found

that the statute does not directly regulate plaintiffs' conduct and does not "require [them] to do anything." Pet. App. 96a. Notwithstanding the undisputed factual record, the district court concluded that plaintiffs' fear that their communications would be acquired under the challenged law was merely speculative. Pet. App. 85a. The district court dismissed plaintiffs' concerns about surveillance as a "subjective chill" insufficient to ground standing. Pet. App. 101a–103a.

A unanimous panel of the Second Circuit vacated the district court's judgment and upheld plaintiffs' standing. The court held that plaintiffs had established injury in fact because of the additional burdens and expenses they had incurred to preserve the confidentiality of their communications. The court then held that this injury was fairly traceable to the FAA because it was an "appropriate" and "reasonable" response, Pet. App. 48a–49a, to the "realistic danger," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), that their communications would be intercepted under the FAA. Pet. App. 30a. Because of that "realistic danger," the court also concluded that plaintiffs had established a likelihood of future injury that provided an independent basis for standing. Noting that the government had contested neither plaintiffs' evidence, Pet. App. 26a, nor their construction of the challenged statute, Pet. App. 36a & n.21, the court described the threat that plaintiffs' communications would be intercepted as "real and immediate," not "conjectural or hypothetical," Pet. App. 29a. Finally, the court ruled that the equitable relief that plaintiffs are seeking would redress the

constitutionally cognizable injuries they had suffered.

The government's petition for rehearing en banc was denied by a six-to-six vote. Pet. App. 114a–115a.[12]

SUMMARY OF ARGUMENT

Plaintiffs' Complaint raises serious constitutional questions about a statute that invests the government with sweeping new authority to collect Americans' international communications from telecommunications switches and other facilities inside the United States. There is no dispute that the statute is being used; there is no dispute that the government is collecting Americans' international communications under it; there is no dispute that it may be used to collect plaintiffs' communications; and there is no dispute that plaintiffs' communications include precisely the kind of information—"foreign intelligence information"—that the statute expressly empowers the government to collect. The only question before the Court is whether plaintiffs have standing.

The court of appeals rightly held that plaintiffs have standing based on two distinct sets of injuries.

---

[12] Judge Hall dissented from the denial of rehearing en banc because he believed the case involved a question of exceptional importance warranting en banc review. Pet. App. 196a. Judges Calabresi and Sack, two of the members of the panel that upheld plaintiffs' standing, were ineligible to participate in deciding whether to grant the government's petition for rehearing en banc. Pet. App. 116a n.1.

First, plaintiffs have standing because the substantial risk that their communications will be monitored under the FAA requires them to take costly and burdensome measures to protect the confidentiality of information that is privileged or sensitive. These costs and burdens are cognizable injuries traceable to the statute and would be redressed by a favorable decision. The government argues that plaintiffs' injuries are "self-inflicted," but as the court of appeals observed, the measures that plaintiffs have taken are reasonable responses to the substantial risk of surveillance under the FAA. Indeed, uncontroverted record evidence, including a declaration from an expert in legal ethics, establishes that some of the measures that plaintiffs have taken are obligatory under rules of professional conduct. The kinds of injuries incurred here—injuries incurred because of plaintiffs' reasonable efforts to avoid greater injuries that are otherwise likely to flow from the conduct they challenge—are the same kinds of injuries that this Court held to support standing in cases such as *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), and *Meese v. Keene*, 481 U.S. 465 (1987).

The government's argument that plaintiffs' injuries are "subjective," and that accordingly this case is controlled by *Laird v. Tatum*, 408 U.S. 1 (1972), is incorrect. The Court held that the *Laird* plaintiffs lacked standing because they failed to establish that they had suffered any injury as a result of the program they had challenged. While the *Laird* plaintiffs claimed that they had been "chilled" by the program, the Court found that their own

submissions cast considerable doubt on that claim. *Laird* did not hold that plaintiffs who suffer actual and ongoing injuries because of government surveillance lack standing unless they can show to a certainty that their communications are actually being collected. To the contrary, the *Laird* Court made clear that plaintiffs who demonstrate "specific present objective harm[s]"—as plaintiffs have done in this case—have standing to sue. *Id.* at 14. The government reads *Laird* to establish a distinct and more restrictive set of standing rules for cases involving government surveillance, but there is no principled reason to treat surveillance cases differently from all others, and *Laird*, properly understood, did not propose that the courts should do so.

Second, even apart from the prophylactic steps that they have taken, plaintiffs have standing because there is an objectively reasonable likelihood that their communications will be acquired under the FAA. The threat of imminent surveillance constitutes a cognizable injury distinct from the injuries noted above, and this injury, too, is traceable to the FAA and would be redressed by a favorable decision.

The government's argument that plaintiffs have failed to establish a sufficiently imminent risk of surveillance under the FAA to ensure the adverseness required by Article III is incorrect. Again, there is no dispute that plaintiffs' communications may be collected under the Act, and there is no dispute that plaintiffs' communications include the kind of information that the Act expressly authorizes the government to collect.

Moreover, in detailed declarations, none of which the government has challenged, plaintiffs have established that they engage in the kinds of communications that are especially likely to be monitored. Importantly, the risk that plaintiffs' communications will be monitored under the statute stems not from the possibility that the government's surveillance authority will be abused but from the indisputably reasonable premise that the statute is being used precisely as it was designed to be used.

The government emphasizes that plaintiffs cannot prove to a certainty that their communications will be monitored under the statute, but Article III does not demand that plaintiffs do so. Requiring plaintiffs to establish a certainty of future injury would be particularly inappropriate in the present context because the secrecy that surrounds the government's surveillance activities will prevent anyone from *ever* satisfying that requirement—not because the surveillance will never take place but because they will be unaware of it when it does. The government's argument also fails to appreciate that an overbroad surveillance authority *itself* deters expressive and associational activity that is vital to any democracy, and that this deterrent effect stems not from the certainty of surveillance but from the substantial risk of it.

The government's theory of standing would render real injuries nonjusticiable and insulate its surveillance activities from meaningful judicial review. Nothing in Article III or this Court's jurisprudence requires or recommends this result, and history counsels emphatically against it. *See* Church Report 1 (stating that absent "new and

tighter controls," surveillance practices "threaten to undermine our democratic society and fundamentally alter its nature").

ARGUMENT

To satisfy the standing requirements of Article III, plaintiffs must establish that (i) they have suffered a "concrete and particularized" injury that is "actual or imminent" rather than "conjectural" or "hypothetical"; (ii) there is a causal connection between their injury and the challenged statute or conduct, such that the injury is "fairly traceable" to the defendant's alleged violation; and (iii) their injury would "likely" be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Application of these requirements is not a "mechanical exercise," *Allen v. Wright*, 468 U.S. 737, 751 (1984), and is properly guided by the underlying purposes of the standing doctrine. "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *see also Lujan*, 504 U.S. at 581 (Kennedy, J., concurring) (standing "preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome").

As the government notes, Gov't Br. 23, 35, the standing requirements also reflect considerations

relating to the separation of powers. These considerations, however, can favor the exercise of jurisdiction as much as the disavowal of it. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); *cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (noting Court's "responsibility to decide cases properly before it, even those it 'would gladly avoid'" (quoting *Cohens*, 19 U.S. (6 Wheat.) at 404)).

The court of appeals correctly concluded that plaintiffs have standing.

I. PLAINTIFFS HAVE STANDING BECAUSE THE FAA CAUSES THEM ACTUAL AND ONGOING INJURIES THAT WOULD BE REDRESSED BY A FAVORABLE DECISION.

A. Plaintiffs are suffering actual injuries that are fairly traceable to the FAA.

The court of appeals correctly held that plaintiffs have satisfied the injury-in-fact

requirement by establishing that the FAA is causing them actual and ongoing professional and economic harms as a result of the substantial risk that their communications are being or will be monitored. Pet. App. 26a, 36a–41a, 43a, 47a–50a. The statute has compelled them to take costly and burdensome measures to protect sensitive and privileged information from the risk of interception. It has deterred them from using the phone and email to exchange information that is privileged or particularly sensitive. *See, e.g.*, Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 371a–373a (McKay Decl. ¶¶ 8, 10). It has compelled them to travel abroad to gather information that they would otherwise have gathered by phone or email. *See, e.g.*, Pet. App. 367a (Hedges Decl. ¶ 9). It leads third parties to refuse to share information that they would otherwise share. *See, e.g.*, Pet. App. 338a (Klein Decl. ¶¶ 8–9); Pet. App. 352a–353a (Royce Decl. ¶ 8). In a variety of ways, the statute has impaired plaintiffs' ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and engage in other legitimate and constitutionally protected communications that their work necessitates. *See, e.g.*, Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 372a–375a (McKay Decl. ¶¶ 10–11, 13–14); Pet. App. 381a–382a, 386a–387a (Gillers Decl. ¶¶ 10, 12, 23).

These injuries, which the court of appeals correctly characterized as "the most mundane of injuries in fact," Pet. App. 26a, are fairly traceable to the FAA. The government does not dispute that the FAA dramatically expands its authority to monitor Americans' international communications. First, by

dispensing with the requirement that the government's surveillance target be an agent of a foreign power, the FAA allows the government to target innumerable people that it cannot target under FISA. Under the FAA, the government can target anyone—human rights researchers, academics, attorneys, political activists, journalists—simply because they are foreigners outside the United States, and in the course of its surveillance it can collect Americans' communications with those individuals. Second, the FAA dispenses with the requirement that the government specify the facilities to be monitored. This means that the government does not need to seek FISA Court approval for each of the phone numbers or email addresses at which its surveillance is directed, and indeed that it can direct its surveillance not at individual phone numbers or email addresses but at categories of phone numbers and email addresses or even gateway switches through which millions of Americans' communications flow. Third, the FAA's "significant purpose" requirement—its "foreign intelligence information" limitation—attaches not to individualized surveillance orders but to entire programs of surveillance. *See* 50 U.S.C. § 1881a(g)(2)(A)(v).

The consequence of the changes wrought by the FAA is that the government can now conduct exactly the kind of dragnet surveillance that the Church Committee found so disturbing. Rather than target its surveillance power at a specific person thought to be the agent of a foreign power, the government can target its surveillance power at a group of people, a neighborhood, a country, or a geographic region. The government contends that it

is "speculative" to suggest that the statute authorizes dragnet surveillance, but, as the court of appeals observed, Pet. App. 36a, the government has not offered any alternative construction of the Act, and the Act does not fairly admit of any alternative construction.

Moreover, executive officials who advocated passage of the Act made clear that the Act was intended to permit dragnet surveillance, *see, e.g.*, Mukasey Letter 4, and legislators who participated in the debate that preceded the Act's passage observed that the proposed law could be used in this way, *see, e.g.*, 154 Cong. Rec. S568 (Feb. 4, 2008) (statement of Sen. Feingold); 154 Cong. Rec. H5743 (June 20, 2008) (statement of Rep. Robert Scott) ("The bill actually permits the government to perform mass untargeted surveillance of any and all conversations believed to be coming into and out of the United States without any individualized finding and without a requirement that any wrongdoing is believed to be involved at all."). The author of the leading treatise on FISA wrote in 2008, correctly, that the debate about the then-proposed FISA modernization bill was about "whether and to what extent the government will be subject to FISA's individualized warrant requirement, rather than a vacuum-cleaner regime, for its foreign intelligence surveillance." David Kris, A Guide to the New FISA Bill, Part I, June 21, 2008, *available at* http://balkin.blogspot.com/2008/06/guide-to-new-fisa-bill-part-i.html.

The government emphasizes that the FAA prohibits the government from targeting Americans inside the United States, Gov't Br. 18, but this

restriction is irrelevant. Plaintiffs' concern is not that they themselves will be targeted under the FAA but that their communications will be collected under it, and the collection of plaintiffs' communications is something that the government concedes the Act permits, Gov't Br. 7. Indeed, although the government uses the word "incidental" to describe the collection of Americans' communications under the statute, the statute was written and enacted with the purpose of permitting the government to collect international communications, including Americans' international communications.[13] In the debate preceding passage of the FAA, lawmakers stated their belief that Americans' communications would in fact be collected under Act.[14] The Bush Administration expressly opposed amendments that would have narrowed the FAA to exclude or provide more protection to Americans' international communications. *See generally* Mukasey Letter.

Plaintiffs' reasonable assumption that their communications will be monitored under the Act is not based solely on the Act's scope; it is based as well on the nature of their work and the nature of their

---

[13] *See* Mukasey Letter 4 (emphasizing that "[p]art of the value of the Protect America Act, and any subsequent legislation" is to allow the government access to communications between Americans at home and terrorism suspects abroad); Hayden Testimony (stating, in hearing relating to FAA's predecessor statute, that "one-end U.S. conversations" are "among the most critically important kinds of terrorist related communications, at least in terms of protecting the homeland").

[14] 154 Cong. Rec. H5770 (June 20, 2008) (statement of Rep. Speier) ("It is fundamentally untrue to say that Americans will not be placed under surveillance after this bill becomes law.").

communications. As discussed above, plaintiffs are attorneys, journalists, and human rights researchers whose work often requires them to communicate with colleagues, clients, sources, witnesses, experts, and victims of human rights abuses overseas. Many of the people with whom plaintiffs communicate are located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Pet. App. 343a–344a (Mariner Decl. ¶ 8); Pet. App. 356a–357a, 361a (Walsh Decl. ¶¶ 5, 11); Pet. App. 365a–366a (Hedges Decl. ¶¶ 4, 7). Some plaintiffs communicate with people who have been the targets of surveillance or other U.S. government attention in the past. Pet. App. 344a (Mariner Decl. ¶ 8). In the course of communicating with these people, plaintiffs routinely convey or receive "foreign intelligence information"—the very information that the FAA expressly authorizes the government to collect. Thus journalist Naomi Klein communicates with indigenous-rights advocates in Colombia about issues relating to the conflict between FARC and the U.S.-backed Colombian government. Pet. App. 337a (Klein Decl. ¶ 6). Human rights researcher Joanne Mariner communicates with former CIA detainees about issues relating to U.S. counterterrorism policy. Pet. App. 344a (Mariner Decl. ¶ 8). Attorney Sylvia Royce communicates with co-counsel and experts in Europe about the cases of individuals currently detained by the U.S. military. Pet. App. 349a (Royce Decl. ¶ 3).

As the court of appeals found, "plaintiffs have good reason to believe that their communications, in particular, will fall within the scope of the broad surveillance that they can assume the government will conduct." Pet. App. 37a. Importantly, plaintiffs'

belief does not stem from speculation about the possibility that the government's surveillance authority will be abused, *Laird*, 408 U.S. at 13, but from the indisputably reasonable assumption that the statute is being used precisely as it was designed to be used. Pet. App. 36a ("It is significant that the injury that the plaintiffs' fear results from conduct that is authorized by the statute."); *see also Massachusetts v. EPA*, 549 U.S. at 516–17.

Plaintiffs' injuries are fairly traceable to the FAA because they stem from plaintiffs' objectively reasonable responses to the risk of surveillance under the statute. Indeed, Professor Gillers' expert declaration—cited and relied on by the court of appeals but entirely unmentioned in the government's brief—explains that the attorney plaintiffs would violate ethical rules and expose themselves to possible bar discipline if they failed to take reasonable measures to protect confidential information from the risk of interception. Pet. App. 387a (Gillers Decl. ¶ 23). As Professor Gillers observes, the Model Rules of Professional Conduct generally prohibit attorneys from "reveal[ing] information relating to the representation of a client unless the client gives informed consent." Pet. App. 379a (Gillers Decl. ¶ 7) (quoting Model Rules of Prof'l Conduct R. 1.6(a)). The prohibition on disclosure of confidential information places a particular burden on attorneys who, like plaintiffs here, have reason to believe that their electronic communications will likely be monitored. Pet. App. 381a (Gillers Decl. ¶ 10) ("If an attorney has reason to believe that sensitive and confidential information related to the representation of a client and transmitted by telephone, fax, or e-mail is reasonably likely to be

intercepted by others, he or she may not use that means of communication in exchanging or collecting information."). As Professor Gillers explains, the FAA *compels* plaintiffs to take measures to protect the confidentiality of their communications. Pet. App. 387a (Gillers Decl. ¶ 23) ("The lawyers' decision to avoid electronic surveillance is *not discretionary. It is obligatory*." (emphasis added)).

An amendment to the Model Rules, adopted by the American Bar Association in August 2012, further clarifies this professional obligation and reinforces that certain measures the attorney plaintiffs have taken are not simply reasonable but mandatory. Motivated by attorneys' increasing reliance on electronic communication, ABA Report 105A at 2 (Aug. 2012), *available at* http://bit.ly/QnDFG4, the ABA amended Model Rule 1.6 to clarify and make express an attorney's obligation to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client." Model Rules of Prof'l Conduct R. 1.6(c). A comment explains that the rule "*requires* a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties." *Id.* cmt. 18 (emphasis added).

Plaintiffs' injuries are thus fairly traceable to the FAA. The FAA exposes plaintiffs' international communications to interception, and the substantial risk of interception requires plaintiffs to take avoidance measures. Further, the measures that plaintiffs are taking "are not overreactions to the FAA; they are appropriate measures that a

reasonably prudent person who plausibly anticipates that his conversations are likely to be monitored, and who finds it important to avoid such monitoring, would take to avoid being overhead." Pet. App. 48a–49a; *see also* 13A Charles Alan Wright et al., Federal Practice and Procedure § 3531.4 (3d ed. 2011) ("The anticipation of future injury may itself inflict present injury. Living with fear and uncertainty is itself a burden, and prudence may dictate efforts to avoid or reduce possible injury.").[15]

B. Plaintiffs' actual injuries are neither "self-inflicted" nor "subjective."

The government does not seriously engage the appeals court's ruling that plaintiffs' responses to the statute are reasonable—again, it fails even to mention Professor Gillers' declaration. It argues, however, that plaintiffs' injuries are insufficient to support standing because they are "voluntary" or "self-inflicted," Gov't Br. 21, 38–39, and because they amount to "subjective chill" of the kind this Court found nonjusticiable in *Laird*, Gov't Br. 22, 39–42. Neither argument has merit.

1. Plaintiffs' actual injuries are not "self-inflicted."

The government's contention that plaintiffs' injuries are "self-inflicted" ignores the record and

---

[15] To the extent the government's argument is that plaintiffs are not in fact obliged to take measures to protect their communications, Gov't Br. 43, the government's argument was waived by failure to contest plaintiffs' submissions below. Pet. App. 17a–18a.

misunderstands the law. Uncontroverted record evidence establishes that plaintiffs must take measures to protect their communications—or compromise the security of sensitive and privileged information, risk exposing sources and witnesses to professional and personal harm, violate rules of professional conduct, and, in the case of the attorney plaintiffs, risk bar discipline. If plaintiffs' injuries are self-inflicted, they are self-inflicted only in the entirely formalistic (and irrelevant) sense that plaintiffs could, in theory, decline to take measures to protect their communications from possible interception and simply accept whatever consequences may follow for them, for their contacts, and for their clients. This Court has made clear, however, that avoidance injuries—injuries incurred as a result of a plaintiff's effort to avoid an injury that would otherwise be inflicted by the defendant's challenged conduct—are sufficient to support standing if they are fairly traceable to the challenged conduct and redressable by the relief sought.

For example, in *Laidlaw*, environmental organizations brought suit under the Clean Water Act against a corporation that they alleged was exceeding statutory limits on the discharge of mercury. The plaintiffs' asserted injury consisted of their cessation of certain activities—for example, swimming, camping, and bird-watching—for fear of exposure to the mercury. *See, e.g.*, *Laidlaw*, 528 U.S. at 181–82 (one plaintiff refrained from fishing in river because of "concern[] that the water was polluted by Laidlaw's discharges"); *id.* at 182 (another plaintiff refrained from walking and bird-watching near the river "because she was concerned about harmful effects from discharged pollutants").

The Court held that the injuries were objectively reasonable responses to the threat of exposure to contaminated water and could not be dismissed as self-inflicted:

> [W]e see nothing improbable about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. *The proposition is entirely reasonable . . . and that is enough for injury in fact.*

Id. at 184–85 (internal quotation marks omitted and emphasis added).

The same principle was applied to find standing in *Keene*, which concerned a state legislator's suit to enjoin application of the Foreign Agents Registration Act, a statute that labeled as "political propaganda" certain expressive materials produced by "agents of foreign principals." 481 U.S. at 473. The plaintiff was particularly concerned about the attachment of that label to certain foreign films about "acid rain," which the plaintiff had not screened out of concern that "if he were to exhibit the films while they bore [the label 'political propaganda'], his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." *Id.* at 473 (internal quotation marks omitted). The plaintiff acknowledged that the challenged statute regulated only the filmmakers, not those who screened the films, but he argued, and

the Court held, that he had standing to challenge the statute because it had deterred him from screening the films. The Court wrote:

> In ruling on the motion for summary judgment, the District Court correctly determined that the affidavits supported the conclusion that appellee could not exhibit the films without incurring a risk of injury to his reputation and of an impairment of his political career. The court found that the Act puts the plaintiff to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation.

Id. at 475 (citation and internal quotation marks omitted).

Particularly germane to plaintiffs' argument here is that the Court found standing even though the plaintiff could have taken measures to minimize the risk of harm to his reputation associated with screening the films. *Id.* at 474–75 (noting that plaintiff could have, for example, "provid[ed] the viewers of the films with an appropriate statement concerning the quality of the motion pictures . . . and his reasons for agreeing with the positions advocated by their Canadian producer"). The "need to take such affirmative steps to avoid the risk of harm," the Court wrote, is itself a cognizable injury. *Id.* at 475.

This Court recently applied the same principle to find standing in *Monsanto*, where farmers of conventional alfalfa challenged the decision of the

Animal and Plant Health Inspection Service (APHIS) to deregulate a variety of genetically engineered alfalfa developed under license from Monsanto Company. The district court held that APHIS had violated the National Environmental Policy Act (NEPA) by issuing a deregulation decision without first preparing an environmental impact statement. To remedy that violation, the district court vacated the agency's deregulation decision, ordered the agency not to act on the deregulation petition until it had completed an environmental impact statement, and enjoined almost all planting of the genetically engineered alfalfa pending completion of that statement. Monsanto appealed the scope of relief granted but did not challenge the existence of a NEPA violation. 130 S. Ct. at 2752. The court of appeals affirmed.

In this Court, Monsanto challenged the farmers' standing to seek injunctive relief. Rejecting this challenge, the Court held that the farmers had established standing because they had demonstrated a "substantial risk" that in the absence of injunctive relief their conventional crops might be infected with the engineered gene. *Id.* at 2747. That risk would predictably injure the farmers in numerous ways, including by reasonably leading them to conduct testing to determine whether their crops had been infected and to "take certain measures to minimize the likelihood of potential contamination and to ensure an adequate supply of non-genetically-engineered alfalfa." *Id.* at 2754–55. The Court wrote:

> Such harms, which respondents will suffer even if their crops are not

> actually infected with the [engineered gene], are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis. Those harms are readily attributable to APHIS's deregulation decision, which . . . gives rise to a significant risk of gene flow to non-genetically engineered varieties of alfalfa.

Id. at 2755; *see also Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011) (government official who prevailed on grounds of qualified immunity had standing to challenge decision that his conduct had violated Constitution because "[s]o long as [the decision] continues in effect, he must either change the way he performs his duties or risk a meritorious damages action").

Laidlaw, *Keene*, and *Monsanto* confirm the justiciability of the injuries that plaintiffs assert here. Like the plaintiffs in those cases, plaintiffs here are required to take costly and burdensome measures to avoid harms threatened by the defendants' conduct, and the measures they are taking are objectively reasonable. Just as there was "nothing 'improbable'" about the *Laidlaw* plaintiffs taking measures to avoid exposure to the polluted river, 528 U.S. at 184, there is nothing improbable about journalists and human rights researchers taking measures to protect the confidentiality of sources and witnesses, or attorneys taking measures to protect communications that are privileged or sensitive. Here, some of the measures that plaintiffs have taken are not simply reasonable but mandatory under rules of professional conduct. Even more than

in *Laidlaw*, *Keene*, and *Monsanto*, therefore, the defendants' conduct in this case presents plaintiffs with a "Hobson's choice," *Keene*, 481 U.S. at 475, between two substantial harms. Pet. App. 49a ("[T]he FAA has put the plaintiffs in a lose–lose situation: either they can continue to communicate sensitive information electronically and bear a substantial risk of being monitored under a statute they allege to be unconstitutional, or they can incur financial and professional costs to avoid being monitored. Either way, the FAA directly affects them.").

The government's argument that plaintiffs' avoidance injuries are insufficient—indeed, irrelevant—because plaintiffs have not shown that surveillance is "imminent," Gov't Br. 27–28, is also mistaken. As an initial matter, it conflates the first two prongs of the standing inquiry: injury in fact and causation. Plaintiffs have unquestionably suffered injuries in fact by incurring certain costs and foregoing certain communications. Pet. App. 26a ("The plaintiffs' declarations . . . establish that they have already incurred professional and economic costs to avoid interception."). These injuries are not simply imminent but *actual*. Because plaintiffs have demonstrated actual injuries, the relevant question is not "imminence"—a concept relevant to determining the justiciability of *future* injury—but whether plaintiffs' actual injuries are fairly traceable to the FAA. Pet. App. 26a–27a; *see also Laidlaw*, 528 U.S. at 184–85; *Monsanto*, 130 S. Ct. at 2754–55; *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 73–74 (1978). For the reasons discussed above, they are.

Furthermore, the government's argument misunderstands the injuries that plaintiffs are trying to avoid. Plaintiffs are taking avoidance measures in response not only to *surveillance* under the FAA but to the *risk* of surveillance. It is not simply future surveillance but the present and substantial risk of surveillance that triggers (for example) the journalist plaintiffs' obligation to forgo certain communications, and the attorney plaintiffs' obligation to travel abroad to gather information that they would otherwise have gathered by phone or email. If plaintiffs did not take those measures, they would immediately be exposing sources and witnesses to the possibility of retaliation and other harms, they would immediately be in violation of rules of professional conduct, and they would immediately be exposed to the possibility of bar discipline. *Cf. Monsanto*, 130 S. Ct. at 2754–55. The substantial risk of surveillance is already manifest, and it is this risk, not actual surveillance, that compels plaintiffs to take avoidance measures.

For similar reasons, the government's complaint that plaintiffs have "manufacture[d] Article III standing 'for the price of a plane ticket,'" Gov't Br. 39 (quoting Pet. App. 148a), is groundless. Again, plaintiffs' injuries stem not from their voluntary actions but from the statute itself, which effectively *compels* plaintiffs to take the measures they have taken in order to meet their professional obligations. To the extent the government's complaint is that plaintiffs' theory results in "similarly situated plaintiffs" being treated differently on the ground that one has taken action to avoid future harm while the other has not, Gov't Br. 39, the answer is that these hypothetical plaintiffs

are not similarly situated if the challenged violation compels one to take immediate action but does not compel the other to do so. Pet. App. 27a.

The government attempts to distinguish *Laidlaw* on the ground that it involved "undisputed" conduct. Gov't Br. 42–43. But this case involves undisputed conduct, too: It is undisputed that Congress has authorized the executive to conduct warrantless surveillance, and it is undisputed that the executive is using that authority. While plaintiffs cannot prove to a certainty that their own communications will be monitored under the FAA, the *Laidlaw* plaintiffs similarly could not prove to a certainty that they would be injured by Laidlaw's conduct.[16] This Court's recent decision in *Monsanto* underscores the deficiency in the government's argument. As discussed above, the plaintiffs in that case could not prove that their crops would be contaminated by the modified gene—only that there was a risk of contamination. The risk, and the necessity of taking measures in response to it, was held sufficient to support standing. *Monsanto*, 130 S. Ct. at 2754–55.

---

[16] Indeed, in *Laidlaw* the feared injury was doubly attenuated: The plaintiffs could only speculate that they would in fact be exposed to the mercury if they entered the river, and the district court had determined that no harm would come of any exposure because the amount of mercury discharged was environmentally insignificant. *See Laidlaw*, 528 U.S. at 181; *id.* at 199 (Scalia, J., dissenting). In this case there is no dispute that plaintiffs would be injured by actual surveillance.

2. Plaintiffs' actual injuries are not "subjective."

The government's contention that plaintiffs' injuries are "subjective," Gov't Br. 42, and therefore nonjusticiable under *Laird* is equally mistaken. *Laird* involved a program under which the Army collected information about public activities that were thought to have the potential to create civil disorder. 408 U.S. at 6. The plaintiffs contended that the program was "beyond the mission requirements of the Army" and that the mere existence of it "constitute[d] an impermissible burden on [them] and other persons similarly situated which exercises a present inhibiting effect on their full expression and utilization of their First Amendment rights." *Id.* at 10 (internal quotation marks omitted). The Court held that plaintiffs lacked standing. The Court reached this conclusion, however, because the *Laird* plaintiffs failed to establish that they had been injured *at all*. While they alleged in broad terms that the program had a "'chilling' effect," their submissions "cast considerable doubt" on whether the program had in fact caused them to alter their behavior. *Id.* at 13 & n.7.

The Court also found that any "chill" that the *Laird* plaintiffs had in fact suffered was not a reasonable response to the program they challenged. The Court emphasized that the challenged program mainly involved the collection of publicly available information, including from "the news media and publications in general circulation" and from agents who attended public meetings. *Id.* at 6. The plaintiffs' claim rested not on the contention that the program was unlawful *per se* but on speculation that

the program might be abused in some unspecified way in the future. *See, e.g.*, *id.* at 9 (noting plaintiffs' argument that "in the future it is possible that information relating to matters far beyond the responsibilities of the military may be misused by the military to [their] detriment").

The injuries asserted in this case are very different from the injuries that were asserted in *Laird*. First, there is no dispute that plaintiffs here have in fact altered their conduct because of the FAA. Second, the record makes clear that plaintiffs have acted reasonably in doing so. Notably, this is not a case like *Laird* in which plaintiffs complain of the possibility that the authority they challenge may be abused in some unknown way in the future. Plaintiffs' claim is based on the reasonable premise that the FAA is being used precisely as it was designed to be used. Pet. App. 54a.

The government reads *Laird* to stand for the proposition that plaintiffs lack standing to challenge government surveillance unless they can show that their communications have actually been monitored, but *Laird* says nothing of the kind. The *Laird* Court found that plaintiffs lacked standing because their complaint was about the surveillance program's "mere existence, without more." 408 U.S. at 10. It expressly distinguished plaintiffs' allegations of "subjective chill," which it held insufficient to support standing, from allegations of "specific present objective harm," which it indicated would be sufficient. *Id.* at 13–14. Plaintiffs' injuries here fall into the latter category. Plaintiffs have been forced to forgo communications that they would otherwise have engaged in. Their ability to locate witnesses,

cultivate sources, and gather information has been compromised. They have been deterred from sharing information that they would otherwise have shared. They have been forced to travel long distances to gather information that, but for the FAA, they would have collected by telephone or email. In some cases the measures they have taken to protect their confidential information are mandatory under rules of professional conduct. These injuries cannot fairly be described as "subjective"; to the contrary, they are the kinds of injuries that the *Laird* Court made clear would be sufficient to support standing. *See also Keene*, 481 U.S. at 472–74 (distinguishing plaintiff who "merely alleged" that challenge statute had deterred him from exercising his First Amendment rights from one who "alleged and demonstrated" that the challenged statute "threaten[ed] to cause him cognizable injury"); *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314, 1318–19 (1974) (Marshall, Circuit Justice) (distinguishing plaintiff who expressed merely a "distaste" for challenged conduct from one who made "specific" allegations of "concrete" effects).[17]

---

[17] Lower courts have not read *Laird* as the government does. *See, e.g., Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006); *Presbyterian Church v. United States*, 870 F.2d 518, 521–22 (9th Cir. 1989); *Smith v. Meese*, 821 F.2d 1484, 1494 (11th Cir. 1987); *Clark v. Library of Cong.*, 750 F.2d 89, 93 (D.C. Cir. 1984); *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984) (Breyer, J.). *But see ACLU v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007). The government relies heavily on *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (1984), Gov't Br. 31, 41, but in that case, which the D.C. Circuit characterized as a challenge to "the constitutionality of the entire national intelligence-gathering system," *id.* at 1381,

At bottom, the government's argument is that plaintiffs who have taken what are not only reasonable but in some instances obligatory measures to avoid harm from unlawful government conduct have suffered no injury that is cognizable under Article III. Neither *Laird* nor any other case identified by the government supports this proposition, and accepting it would require the Court either to overrule cases like *Monsanto* and *Laidlaw* or to create a distinct set of standing rules to govern challenges to government surveillance. There is no good reason to do either of these things.

C. Plaintiffs' actual and ongoing injuries would be redressed by a favorable judgment.

Plaintiffs have taken costly and burdensome measures in response to the risk of surveillance under the FAA. A declaration that the statute is unconstitutional, and an injunction against its use, would render these measures unnecessary. Accordingly, the court of appeals was correct to hold that plaintiffs' injuries would be redressed by a favorable judgment. Pet. App. 41a n.24; Pet. App. 126a–127a (Lynch, J., concurring in the denial of rehearing en banc).

The contention that plaintiffs lack standing because "they have not sought to enjoin all possible government surveillance of their contacts abroad," Gov't Br. 45, misunderstands plaintiffs' burden. "[A]

---

plaintiffs failed to establish that the harms they had suffered were effectively coerced or objectively reasonable responses to the authority they challenged.

plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

Massachusetts v. EPA is instructive. In that case plaintiffs argued that the EPA's refusal to regulate greenhouse gas emissions aggravated the harm petitioners would suffer from global climate change. The EPA responded that "its decision not to regulate [such emissions] contributes . . . insignificantly to petitioners' injuries," and that no "realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries . . . because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease." 549 U.S. at 523–24. Notwithstanding the EPA's argument, the Court held that plaintiffs' injuries were redressable:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether the EPA has a duty to take steps to *slow* or *reduce* it.

Id. at 525; *see also id.* at 524 (noting that the EPA's challenge to the redressability of global warming "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum").

Duke Power found standing on similar reasoning. Plaintiffs in that case challenged

provisions of the Price–Anderson Act that capped liability for nuclear accidents resulting from the operation of private nuclear plants licensed by the government. 438 U.S. at 62. The plaintiffs asserted multiple injuries, including an "objectively reasonable present fear and apprehension regarding the effect of the increased radioactivity in air, land and water upon [them] and their property." *Id.* at 73 (internal quotation marks omitted). The defendant public utility company argued that plaintiffs had failed to establish redressability because "the Government would have undertaken development of nuclear power on its own and the same injuries would likely have accrued to [the plaintiffs] from such Government-operated plants as from privately operated ones." *Id.* at 77. The Court rejected this argument. "Whatever the ultimate accuracy of [the defendants'] speculation, it is not responsive to the simple proposition that private power companies now do in fact operate the nuclear-powered generating plants injuring [the plaintiffs], and that their participation would not have occurred but for the enactment and implementation of the Price–Anderson Act." *Id.* at 77–78; *see also Keene*, 481 U.S. at 476 ("enjoining the application of the words 'political propaganda' to the films would at least *partially* redress the reputational injury of which appellee complains" (emphasis added)).[18]

---

[18] The government alludes to the possibility that some of plaintiffs' communications could be collected by the United States under authorities other than the FAA and FISA. Gov't Br. 45. Beyond merely citing the executive order that governs all U.S. intelligence activities, however, the government fails to explain this point, let alone identify which authorities it means,

The government's redressability argument also fails to appreciate that the burden imposed on plaintiffs by the FAA is distinct from that imposed by other surveillance. As the court of appeals observed, the FAA substantially expands the government's authority to monitor Americans' communications. Pet. App. 37a. The government itself acknowledges that, unlike FISA—which permits surveillance only upon a judicial finding that the target is a foreign agent or foreign power—the FAA permits surveillance without individualized suspicion or individualized judicial review. Gov't Br. 6. One consequence is that surveillance programs authorized under the FAA may sweep up thousands or even millions of communications. Another is that entire categories of communications are now far more likely to be collected by the government than was the case before the FAA was enacted. *See, e.g.*, Pet. App. 337a (Klein Decl. ¶¶ 6–7) (foreign activists and advocates for indigenous rights); Pet. App. 342a–346a (Mariner Decl. ¶¶ 5, 7, 9, 11) (translators, relatives of detainees, political activists, victims of human rights abuses, witnesses, experts, and

---

or explain what those authorities allow. *Cf. Duke Power*, 438 U.S. at 78 (stating that plaintiffs need not "negate [other] speculative and hypothetical possibilities . . . in order to demonstrate the likely effectiveness of judicial relief"). If the government could already monitor all of the communications at issue here, there would have been no need for the FAA. Pet. App. 37a ("the FAA was passed specifically to permit surveillance that was not permitted by FISA"); Pet. App. 121a ("[P]roponents of the statute argued that it was necessary precisely because it made possible expanded surveillance that would not have been permitted under prior law." (citing legislative history)).

scholars); Pet. App. 350a–353a (Royce Decl. ¶¶ 5–8) (co-counsel, relatives of client, journalists, and researchers).

Finally, the government's argument that plaintiffs cannot establish redressability because some of their communications might be susceptible to surveillance by other countries, Gov't Br. 46, fails as a matter of law. *Massachusetts v. EPA*, 549 U.S. at 523–26 ("Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."); *Duke Power*, 438 U.S. at 77–78. The government's argument also fails to engage the record, which shows that some of plaintiffs' communications are likely to be of interest to the U.S. government in particular. Pet. App. 342a (Mariner Decl. ¶ 5) (communications about CIA rendition program, CIA black sites, abuses committed by U.S. military personnel in Afghanistan and Iraq, and the Guantánamo Bay military commissions); Pet. App. 371a, 373a–374a (McKay Decl. ¶¶ 7, 12) (David Nevin's communications relating to representation of Khalid Sheik Mohammed); Pet. App. 356a–362a (Walsh Decl. ¶¶ 5–13) (communications with individuals in countries with an antagonistic relationship with the United States—including Cuba, Venezuela, and others—about U.S. foreign policy). The record also shows that some of plaintiffs' foreign contacts fear surveillance by the U.S. in particular. Pet. App. 337a–338a (Klein Decl. ¶¶ 6, 8); Pet. App. 361a (Walsh Decl. ¶ 11); Pet. App. 343a–345a (Mariner Decl. ¶¶ 8, 10). The record also shows that there are

unique concerns associated with surveillance by the United States. Pet. App. 371a–372a (McKay Decl. ¶ 8) (discussing concerns about U.S. surveillance where the government is the opposing party in litigation); Pet. App. 351a–352a (Royce Decl. ¶ 7) (same).

II. PLAINTIFFS HAVE STANDING BECAUSE SURVEILLANCE OF THEIR COMMUNICATIONS UNDER THE FAA IS "IMMINENT."

Plaintiffs also have standing because they have demonstrated that surveillance of their communications is "imminent" within the meaning of Article III given the scope of the statute, the nature of plaintiffs' communications, and the identities and locations of plaintiffs' contacts.

As discussed above, there is no dispute that the FAA is being used; there is no dispute that the government is collecting Americans' international communications under it; there is no dispute that it may be used to collect plaintiffs' communications; and there is no dispute that plaintiffs' communications include precisely the kind of information—"foreign intelligence information"—that the FAA expressly empowers the government to collect. That plaintiffs cannot be "targeted" under the statute, Gov't Br. 18, is irrelevant. Plaintiffs' concern is not that they will be targeted but that their communications will be acquired. Importantly, the risk that plaintiffs' communications will be monitored under the statute stems not from the possibility that the government's surveillance authority will be abused but from the reasonable

premise that the statute is being used precisely as it was designed to be used.

As the court of appeals observed, plaintiffs have "good reason" to believe that their communications will in fact be collected under the statute. Pet. App. 37a. In six detailed declarations, none of which the government has challenged, plaintiffs have established that they communicate with "precisely the sorts of individuals that the government will most likely seek to monitor": foreign political dissidents, human rights activists, journalists, attorneys, and other individuals located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Pet. App. 37a. As the court of appeals wrote, "[p]laintiffs' assessment that these individuals are likely targets of FAA surveillance is reasonable." Pet. App. 37a.

The government faults the court of appeals for holding that plaintiffs could establish standing by demonstrating an objectively reasonable likelihood of future harm, but that standard is one that this Court has applied repeatedly. *See, e.g.*, *Camreta*, 131 S. Ct. at 2029 (citing *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983), for the proposition that a party has standing where it demonstrates a "sufficient likelihood" of injury); *Monsanto*, 130 S. Ct. at 2754 (holding that Monsanto had standing to challenge lower court ruling because "there is more than a strong likelihood" that, but for ruling, agency would deregulate engineered gene); *Massachusetts v. EPA*, 549 U.S. at 526 n.23 ("[E]ven a small probability of injury" can be sufficient to create a case or controversy. (alteration in original) (quoting *Vill. of*

Elk Grove Vill. v. Evans, 997 F.2d 328, 329 (7th Cir. 1993))); *Pennell v. City of San Jose*, 485 U.S. 1, 2 (1988) (landlords' association had standing to challenge rent control ordinance where demonstrated a "realistic danger" of direct injury); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383 (1988) (booksellers had standing where demonstrated an "actual and fell-founded fear" that the challenged law would be enforced against them); *Blum v. Yaretsky*, 457 U.S. 991, 999–1001 (1982) (nursing home residents had standing to challenge transfers to lower levels of care where possibility of such transfers was "quite realistic"); *Duke Power*, 438 U.S. at 73–74 (plaintiffs who demonstrated "'objectively reasonable' present fear" of radiation had standing to challenge statute that imposed limitation on liability for nuclear accidents). The government's contention that the "objectively reasonable likelihood" standard is "novel," Gov't Br. 25, is incorrect.

The government's argument that plaintiffs must show that the injury they fear is "certain[]" to occur, Gov't Br. 19, is also incorrect. While the Court has sometimes used the phrase "certainly impending" as a gloss on the imminence requirement, it has used the phrase interchangeably with some version of "reasonable likelihood of future harm." *See, e.g.*, *Laidlaw*, 528 U.S. at 190 (plaintiff in *Lyons* did not meet *Whitmore*'s "certainly impending" standard because "he could not credibly allege that he faced a realistic threat"); *Adarand Constructors v. Pena*, 515 U.S. 200, 211–12 (1995) (where construction company challenged subcontractor-compensation statute, "certainly impending" requirement was satisfied because plaintiff was "likely" to be given opportunity to bid on

regulated contracts and was "very likely" to bid on those contracts); *Babbitt*, 442 U.S. at 298 ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. . . . If the injury is certainly impending, that is enough.").

The government relies heavily on *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), which suggested that "imminence" requires more than "a realistic threat," but in *Summers* the plaintiffs had not established any substantial likelihood that they would be injured in the future by the regulation they challenged. *Summers*, 555 U.S. at 495 ("There may be a chance, but is hardly a likelihood, that [plaintiff's] wanderings will bring him to a parcel [of the National Forests] about to be affected by a project unlawfully subject to the regulations."). *Summers* was a case, in other words, in which the Court concluded that plaintiffs could not satisfy *any* arguably applicable standard for justiciable injury. *Id.* at 500 ("The problem for the dissent is that the timely affidavits no more meet that [lower] requirement than they meet the usual formulation.").[19]

---

[19] The government also relies heavily on *Whitmore v. Arkansas*, 495 U.S. 149 (1990). That case cites four cases in support of the proposition that plaintiffs must establish that their injury is "certainly impending." Only two of these used the phrase "certainly impending." One is *Babbitt*, which, as noted above, used the phrase interchangeably with "realistic danger." The other is *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), which indicated that a "certainly impending" injury was *sufficient* to support standing. *Id.* at 593 ("If the injury is certainly impending, that is enough.").

The critical issue is not the precise language used in different decisions but whether the facts of the case provide a basis to believe that the legal questions before the Court will be presented with the concreteness and adverseness that Article III demands.[20] The government's insistence that plaintiffs cannot establish standing without proving the certainty of surveillance is at bottom not a standing argument but a bid for a kind of immunity. This is because its proposed standard is one that neither plaintiffs nor anyone else will ever be able to meet—not because the surveillance they fear will never take place but because they will be unaware of it when it does.[21] Unlike analogous law enforcement statutes, the FAA does not generally require the government to notify individuals whose communications it has monitored. *Cf.* 18 U.S.C. § 2518(8) (criminal wiretap statute requiring government to provide notice, within 90 days after termination of surveillance, to surveillance target and "such other parties to intercepted

---

[20] The government's complaint that plaintiffs' case would require litigation of the constitutionality of the FAA "in the abstract," Gov't Br. 36, ignores the concrete facts contained in plaintiffs' declarations. Moreover, the government does not explain how evidence that plaintiffs will certainly be surveilled would change the nature of the district court's task on the merits—plainly it would not. The question on the merits is simply the facial validity of a statute, the kind of question routinely raised by pre-enforcement challenges.

[21] Indeed, it is entirely possible that the surveillance plaintiffs fear is taking place already, and that it is only the government's secrecy that forecloses plaintiffs from meeting the standing requirement that the government urges the Court to impose.

communications as the judge may determine in his discretion that is in the interest of justice"). While the FAA requires the government to provide a form of notice to those who are *prosecuted* on the basis of FAA evidence, it is the executive that decides whether to commence such prosecutions and to introduce such evidence, and accordingly it is the executive that determines whether its surveillance will be subject to judicial review. *See Keith*, 407 U.S. at 318 (noting that "post-surveillance review would never reach the surveillances which failed to result in prosecutions"). As far as plaintiffs are aware, the government has yet to introduce FAA-derived evidence in a criminal trial, though four years have passed since the statute was signed into law.[22]

There is another reason not to embrace the government's prohibitive interpretation of Article III: As the Court has recognized, *Keith*, 407 U.S. at 313–14, and as the experience of many other countries attests, an overbroad surveillance authority deters expressive and associational activity that is vital to any democracy, and this chilling effect stems not

---

[22] It is not at all clear what must be disclosed under the FAA's notice provision even if the government does prosecute someone using FAA evidence. *Compare* 50 U.S.C. § 1806(c) (traditional FISA notice provision), *with* 50 U.S.C. § 1881e(a) (FAA notice provision directing the government to treat FAA surveillance as traditional FISA surveillance under FISA's notice provision); *see also* Order, *United States v. Khan*, No. 1:11-cr-20331 (S.D. Fla. Mar. 14, 2012) (ECF No. 285) (upholding government's refusal to disclose whether its FISA application relied upon evidence obtained under the FAA); Gov't Resp., *United States v. Khan*, No. 1:11-cr-20331 (S.D. Fla. Mar. 14, 2012) (ECF No. 284).

simply from the certainty of surveillance but from the substantial possibility of it. 154 Cong. Rec. S574 (Feb. 4, 2008) (statement of Sen. Cardin) ("The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy within lawful limits, without having to sacrifice the expectation of privacy they rightfully hold. Warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.").

More than forty years ago, when surveillance technology was comparatively primitive, this Court recognized that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices," *Berger v. New York*, 388 U.S. 41, 63 (1967), and it cautioned that the threat to core democratic rights was especially pronounced where surveillance authority was exercised in the service of national security, *Keith*, 407 U.S. at 313 ("National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech."). To accept the government's theory of standing would be to accept that the courts are powerless to address the threat presented by surveillance authorities exercised in secret, and powerless to protect Americans' most fundamental constitutional rights against the encroachment of increasingly sophisticated and intrusive forms of government power.

Contrary to the government's formalistic approach, the Court has long recognized that the "concept [of standing] cannot be reduced to a one-sentence or one-paragraph definition," *Valley Forge*, 454 U.S. at 475, and that application of its three requirements is not a "mechanical exercise," *Allen*, 468 U.S. at 751; *see also Lujan*, 504 U.S. at 565 n.2. The government's theory of standing would render real injuries nonjusticiable and insulate the government's surveillance activities from meaningful judicial review. The Court's Article III jurisprudence has never been oblivious to such practical realities, and it should not be.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

Jameel Jaffer
Counsel of Record
Steven R. Shapiro
Alexander A. Abdo
Mitra Ebadolahi
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
jjaffer@aclu.org

Arthur N. Eisenburg
Christopher T. Dunn
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 607-3300

Charles S. Sims
Matthew J. Morris
Proskauer Rose LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

REPLY BRIEF

No. 11-1025

In the Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. Respondents' summary-judgment standing evidence is entirely speculative 3
B. Respondents have not established imminent and non-speculative future surveillance under Section 1881a 12
C. Respondents' self-imposed harms are not a basis for standing 16
1. Respondents' self-inflicted harms do not qualify as cognizable injuries 16
2. Respondents have failed to establish redressability 22

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995) 12
Arizona Christian Sch. Tuition Org. v. *Winn*, 131 S. Ct. 1436 (2011) 15
Automatic Radio Mfg. Co. v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950) 4
Babbitt v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) 13
Blum v. *Yaretsky*, 457 U.S. 991 (1982) 13
Bryan v. *United States*, 524 U.S. 184 (1998) 9
Camreta v. *Greene*, 131 S. Ct. 2020 (2011) 13
DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 21
Directives, In re, 551 F.3d 1004 (FISC Rev. 2008) 10

Cases—Continued: Page

Duke Power Co. v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978) 14
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 14, 20
Laird v. *Tatum*, 408 U.S. 1 (1972) 17, 18, 19
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) .. 12, 13
Meese v. *Keene*, 481 U.S. 465 (1987) 20
Monsanto Co. v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010) 20, 21
Pennell v. *City of San Jose*, 485 U.S. 1 (1988) 13
Samson v. *California*, 547 U.S. 843 (2006) 10
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 16
Sealed Case, In re, 310 F.3d 717 (FISC Rev. 2002) 10
Sibron v. *New York*, 392 U.S. 40 (1968) 10
Summers v. *Earth Island Inst.*, 555 U.S. 488 (2009) 13, 21
Virginia v. *American Booksellers Ass'n*, 484 U.S. 383 (1988) 13
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 15

Constitution, statutes and rule:

U.S. Const.:
Art. II 11
Art. III ..... *passim*
Amend. IV 4, 9, 10, 17

Statutes and rule—Continued: Page

FISA Amendments Act of 2008, Pub. L. No. 11-0261, 122 Stat. 2436 (Supp. II 2008) 8
50 U.S.C. 1881a ..... *passim*
50 U.S.C. 1881a(b)(5) 9
50 U.S.C. 1881a(c)(1)(A) 4
Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (50 U.S.C. 1801 *et seq.*) 6
50 U.S.C. 1801(f)(1) 6
50 U.S.C. 1801(f)(2) 6
50 U.S.C. 1801(f)(3) 6
Protect America Act of 2007, Pub. L. No. 110-55, secs. 2-3, §§ 105A-105C, 121 Stat. 552-555 (repealed 2008) 8
50 U.S.C. 1805a (Supp. I 2007) 8
50 U.S.C. 1805b(a) (Supp. I 2007) 8
50 U.S.C. 1805c(b) (Supp. I 2007) 8
Fed. R. Civ. P. 56(c)(4) 4

Miscellaneous:

154 Cong. Rec. (daily ed. Feb. 4, 2008):
p. S568 8
p. S569 9
p. S572 9
154 Cong. Rec. H5759 (daily ed. June 20, 2008) 8
FISA for the 21st Century, Hearing Before the Senate Comm. on the Judiciary, 109th Cong., 2d Sess. (2006) 5, 6, 7

Miscellaneous—Continued: Page

1 David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* (2d ed. 2012) 7

Letter from Attorney General Mukasey and Director of National Intelligence McConnell to Senator Reid (Feb. 5, 2008), http://www.justice.gov/archive/ll/docs/letter-ag-to-reid020508.pdf 7

11 James Wm. Moore et al., *Moore's Federal Practice* (3d ed. Supp. Dec. 2011) 4

10B Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 1998) 5

In the Supreme Court of the United States

No. 11-1025

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The court of appeals held that respondents—who cannot be targeted by foreign-intelligence surveillance conducted under 50 U.S.C. 1881a (Supp. II 2008) and who have not established that communications involving them have been or ever will be incidentally collected by such surveillance targeting foreigners abroad—have Article III standing to challenge Section 1881a's constitutionality. The government's opening brief explains that respondents cannot establish standing based on their contentions that (1) the government could incidentally acquire their communications in the future using Section 1881a's authority, Gov't Br. 24-37, and (2) they suffered cognizable injury as a result of their own choice to incur costs to avoid the risk of surveillance they fear might be occurring, *id.* at 38-47. In response, respon-

dents argue (Resp. Br. (Br.) 53-60) that they have established an "imminent" future injury by showing an "objectively reasonable likelihood" that communications involving them will be acquired in the course of Section 1881a-authorized surveillance of foreigners abroad. They alternatively contend (Br. 28-53) that, even if they cannot establish imminent injury based on a likelihood that their communications will be acquired, their self-inflicted harms suffice to establish injury and would be redressed by an injunction prohibiting intelligence activity under Section 1881a. Respondents' theories are inconsistent with this Court's decisions, would require courts to adjudicate the constitutionality of an Act of Congress in the abstract in a vitally important national-security context involving highly classified information, and disregard the separation of powers principles upon which this Court's standing doctrine rests.

In the final analysis, respondents' case for standing depends entirely upon speculation. Lacking any evidence of concrete government action that has, or will, harm them, respondents offer conjecture about the nature and scope of potential surveillance under Section 1881a; the Executive's foreign-intelligence interests and targeting priorities at any particular time; the extent of the collection authority that would be allowed under a Section 1881a order of the Foreign Intelligence Surveillance Court (FISC); the government's use of Section 1881a rather than other foreign-intelligence-collection authorities; and, ultimately, whether Section 1881a-authorized surveillance targeting foreigners abroad would incidentally collect communications involving respondents. Such conjecture cannot establish Article III standing.

A. Respondents' Summary-Judgment Standing Evidence Is Entirely Speculative

Respondents premise their argument on the contention that Section 1881a authorizes and would be invoked by the government to conduct so-called "dragnet" or "vacuum-cleaner-style" surveillance of communications content "without individualized suspicion," which might otherwise limit acquisitions to "specific targets and facilities." Br. 7, 10-11. Respondents state (Br. 10-11) that Section 1881a "could authorize the acquisition of all communications to and from specific geographic areas of foreign policy interest," such as "Russia, Iran, or Israel," and "exposes *every* international communication—that is, every communication between an individual in the United States and a non-American abroad—to the risk of surveillance." Respondents additionally believe (Br. 16-17) their international communications are at particular risk because they posit that the government is interested in collecting communications from their (largely unidentified) foreign contacts, who respondents say are in "geographic areas" they surmise are of government interest or are persons who they surmise federal officials might want to target. Such conjecture is insufficient to carry respondents' burden of proving Article III standing and cannot be salvaged by respondents' claim that they assert a "facial" challenge to Section 1881a, their proffered evidence at summary judgment, or their reliance on extra-record materials.

1. Respondents assert (Br. 29-31, 46, 57 n.20) that they are challenging "the facial validity" of Section 1881a and argue that "[t]he statute" itself—not the possibility that its authority might "be abused"—"has compelled them to take costly and burdensome measures" to avoid their perceived risk of unfocused, "dragnet" sur-

veillance. Respondents' position underscores their conjectural basis for standing.

Section 1881a does not require an individualized court order for each non-United States person targeted, Gov't Br. 6, but that does not mean that it authorizes or would lead to the so-called "dragnet" surveillance of communications content that respondents claim to fear. Section 1881a specifically (1) requires the FISC to determine that the government's targeting and minimization procedures satisfy both statutory requirements and the Fourth Amendment, and (2) authorizes acquisitions only if, *inter alia*, they are conducted in accordance with those procedures and comply with the Fourth Amendment. 50 U.S.C. 1881a(b)(5) and (c)(1)(A) (Supp. II 2008); Gov't Br. 7-8, 34.

2. Respondents' declarations (Pet. App. 334a-395a) provide no evidentiary basis for respondents' fears of Section 1881a-authorized surveillance. The declarations state that the declarants "understand" that a dragnet of international communications content could be conducted under Section 1881a and "believe" that communications involving them are likely to be intercepted, based on conjecture about actions and decisions by the government and the FISC. See Gov't Br. 30-34. Because the declarations provide no "specific facts" about surveillance activity and are not based on "personal knowledge" reflecting matters about which the declarants are competent to testify, they amount to nothing more than "conclusory allegations" about surveillance activity and do not evince facts cognizable at summary judgment. *Id.* at 28-29; see Fed. R. Civ. P. 56(c)(4); *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 831 & n.4 (1950) (affidavits based on "information and belief" are insufficient); 11 James Wm. Moore

et al., *Moore's Federal Practice* § 56.94[2][b], at 56-218 to 56-224 & n.15 (3d ed. Supp. Dec. 2011); 10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2738, at 345-353 & nn.32, 34 (3d ed. 1998). Respondents do not dispute that their declarants lack "personal knowledge" of actual government surveillance activities or the content of the FISC's decisions. In fact, respondents' brief conspicuously fails even to acknowledge (let alone dispute) their evidentiary burden at summary judgment. They have thus adduced no evidence substantiating their claim of dragnet surveillance or their assertion of a reasonable likelihood that their communications will be acquired by Section 1881a-authorized surveillance.

3. Respondents instead rely (Br. 10-12 & nn.5-6, 30-31) on several extra-record sources to support their assertions of "dragnet" or "vacuum-cleaner-style" surveillance. Those sources, which the court of appeals did not cite, do not support respondents' conjecture.

Respondents assert (Br. 10 n.5, 11) that congressional testimony by then-Director of the Central Intelligence Agency Hayden—who was formerly Director of the National Security Agency (NSA)—supports their dragnet theory. But respondents' selective quotation omits key language that emphasizes the focused nature of the government's interests. *FISA for the 21st Century, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 9 (2006) (*2006 Hearing*) ("the *al Qaeda communications* that are most important to us" are those "with one end * * * in the United States") (emphasis added). Indeed, Director Hayden was specifically asked whether the government could, for instance, "seize and record all the calls between the United States and India" with a type of "vacuum cleaner

surveillance" if Congress repealed FISA's provision regulating the acquisition of the contents of wire communications to or from a person in the United States when the acquisition occurs in the United States. *Id.* at 35 (discussing repeal of 50 U.S.C. 1801(f)(2)).[1] He answered, "no, not at all"; stated that such a repeal would permit "target[ed]" surveillance; and emphasized that surveillance under the President's Terrorist Surveillance Program (TSP) was "targeted," not "vacuum cleaner," surveillance. *Ibid.* ("[W]e do not vacuum up the contents of communications under the [TSP] and then use some sort of magic after the intercept to determine which of those we want to listen to."); cf. *id.* at 24 (NSA Director Alexander) ("We are going to focus it down onto the most important [phone calls], and we have ways and methods to do that that we should not discuss here."); Pet. App. 284a, 301a-302a, 306a (Director Hayden) (similar). In the same hearing, NSA Director Alexander added that "[t]here is no reason to believe that

[1] Because Section 1881a authorizes certain acquisitions of communications content by targeting non-United States persons abroad (with the assistance of an electronic-communication-service provider), it confers authority for collecting the contents of wire communications to or from a person in the United States, which would otherwise be regulated by Title I of FISA as "electronic surveillance" under 50 U.S.C. 1801(f)(2). Section 1881a's limitation to targeting non-United States persons abroad does not implicate authority to conduct the two other types of FISA "electronic surveillance" that cover the collection of the contents of wire or radio communications by "intentionally targeting [a] United States person," 50 U.S.C. 1801(f)(1), or intentionally acquiring a radio communication where "the sender and all intended recipients are located within the United States," 50 U.S.C. 1801(f)(3). Director Hayden's response discussing the repeal of Section 1801(f)(2) is thus relevant to whether Section 1881a would permit "dragnet" surveillance to collect the contents of wire or radio communications entering or exiting the United States.

[proposed legislation] would authorize programs that 'far exceed' the [TSP] in size and scope, since any such program would still have to meet the Fourth Amendment's reasonableness requirement." *2006 Hearing* 62.

Respondents also assert (Br. 11-12, 31-32 & n.13) that government officials "expressly sought authority to engage in dragnet" surveillance. But the letter they cite merely states that the government "may wish to target all communications in a particular neighborhood abroad before our armed forces conduct an offensive" and that such "targeting [of] a particular group of buildings or a geographic area abroad" before "military operations," which would not significantly affect "the privacy interests of United States persons," should be permitted. Letter from Attorney General Mukasey and Director of National Intelligence McConnell to Senator Reid 4 (Feb. 5, 2008), http://www.justice.gov/archive/ll/docs/letter-ag-to-reid020508.pdf. That focused and time-limited targeting activity bears no resemblance to respondents' speculative dragnet. Respondents also cite (Br. 9-10) a treatise's "discuss[ion of the] probable operation of the Program" to support their assertion that "millions of people" could be affected. But the treatise simply speculates that FISC-authorized surveillance from January 2007, the details of which were not made public, applied a "minimization standard * * * at the acquisition stage—i.e., before the government may listen to or record a communication"—that, "[d]epending on how it is being applied," might avoid "the problem of [intercepting] innocent user[s]." 1 David S. Kris & J. Douglas

Wilson, *National Security Investigations and Prosecutions* § 16.12, at 577 & n.18 (2d ed. 2012).[2]

Finally, respondents resort (Br. 12 n.6, 31-32 & n.14) to statements by individual opponents of the FISA Amendments Act of 2008 (FAA) and a predecessor bill, who asserted during debate preceding passage of the law that the then-pending bills would grant "authority to conduct a huge dragnet that will sweep up innocent Americans at home," 154 Cong. Rec. S568 (daily ed. Feb. 4, 2008) (Sen. Feingold); see *id.* at H5759 (June 20, 2008) (Rep. Scott). Such "fears and doubts of the opposition,"

---

[2] The January 2007 FISC orders authorized the first of three successive legal regimes that displaced the post-September 11 foreign-intelligence surveillance authorized under the President's TSP. The FISC orders authorized the government to "target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization." Pet. App. 312a. In light of those orders, the President did not reauthorize the TSP, and any electronic surveillance that was occurring as part of the TSP was conducted under the January 2007 orders. *Id.* at 312a-313a.

In August 2007, Congress passed the Protect America Act of 2007 (PAA), Pub. L. No. 110-55, secs. 2-3, §§ 105A-105C, 121 Stat. 552-555 (50 U.S.C. 1805a-1805c (Supp. I 2007) (repealed effective February 2008 by sunset provision)). The PAA amended the definition of "electronic surveillance" subject to Title I of FISA to exclude "surveillance directed at a person reasonably believed to be located outside of the United States," 50 U.S.C. 1805a (Supp. I 2007), and authorized the Director of National Intelligence and Attorney General jointly to authorize for one-year periods foreign-intelligence collection "concerning persons reasonably believed to be outside the United States" if certain requirements were satisfied, including subsequent FISC review of the procedures used to determine that the relevant acquisitions did not constitute "electronic surveillance." 50 U.S.C. 1805b(a), 1805c(b) (Supp. I 2007). The FISA Amendments Act of 2008, including Section 1881a, replaced the PAA.

however, "are no authoritative guide to the construction of legislation," because, "[i]n their zeal to defeat a bill, they understandably tend to overstate its reach." *Bryan* v. *United States*, 524 U.S. 184, 196 (1998) (citations omitted). Indeed, after Senator Feingold opposed the legislation and advocated "safeguards *in case* the Government is, in fact, conducting massive dragnet surveillance," 154 Cong. Rec. at S569 (emphasis added), a leading proponent specifically noted the numerous "misconceptions and misinterpretations" in the debate, *id.* at S572 (Sen. Bond, Vice Chairman, Senate Select Committee on Intelligence) (stating that "only certain communications" were authorized for acquisition and, in any event, "acquir[ing] all the communications from all foreigners is an absolutely impossible task").

4. Respondents' asserted pursuit of a "facial" challenge to Section 1881a does not diminish the need for a sound evidentiary basis establishing actual or imminent Section 1881a-authorized collection of communications that involve respondents. Indeed, respondents' contention that the dragnet surveillance they fear would violate the Fourth Amendment, see Gov't Br. 34, itself indicates that respondents do not actually present a facial challenge. They instead apparently believe that the FISC and the government would *misapply* Section 1881a by permitting activity that violates the Fourth Amendment, which would also violate Section 1881a itself. See 50 U.S.C. 1881a(b)(5). That is, at bottom, an as-applied challenge, which would require competent evidence of the government's actual application of its Section 1881a authority in a concrete context, if surveillance of communications incidentally involving respondents should actually occur.

Respondents' standing contentions are particularly problematic because respondents would have federal courts adjudicate in the abstract the constitutionality of actions they speculate will be undertaken by a co-equal Branch of Government. Gov't Br. 35-36. The reasonableness of a Fourth Amendment search, for instance, is judged by the "totality of the circumstances" surrounding it, including the "degree to which it intrudes upon an individual's privacy" and the "degree to which it is needed for the promotion of legitimate governmental interests." See *Samson* v. *California*, 547 U.S. 843, 848 (2006) (citation omitted); cf. *Sibron* v. *New York*, 392 U.S. 40, 59-60 (1968) (a facial Fourth Amendment challenge to a statute is an "abstract and unproductive exercise"). The Foreign Intelligence Surveillance Court of Review has accordingly determined from the "totality of the circumstances" (which were classified and redacted from its public opinion) that foreign-intelligence surveillance targeting persons abroad under Section 1881a's statutory predecessor was reasonable under the Fourth Amendment and satisfied a constitutional "particularity requirement." *In re Directives*, 551 F.3d 1004, 1007, 1012-1014 (2008) (citing particularity analysis in *In re Sealed Case*, 310 F.3d 717, 740 (FISC Rev. 2002)); Gov't Br. 8 n.6. Although respondents assert (Br. 57 n.20) that their declarations contain "concrete facts," they identify no facts on which courts could properly adjudicate their claims.

Respondents' effort to characterize their action as a facial challenge appears designed to avoid implicating the highly classified national-security information that would be necessary to evaluate the merits of their challenge to foreign-intelligence collection under Section 1881a. Such information includes information about the

government's foreign-intelligence collection and targeting priorities; the foreign intelligence and threat assessments that may justify such targeting; the technical methods used for foreign-intelligence targeting and the associated degree of success in intelligence collection; the details of the FISC's rulings defining the nature and scope of, and the requisite procedures for, authorized foreign-intelligence collection under Section 1881a; and the government's alternative sources and methods for foreign-intelligence collection targeting non-United States persons abroad using authorities other than Section 1881a. Sacrificing such information not only would require that Article III courts speculate about the essential facts needed to adjudicate respondents' claims, it also would improperly require those courts to speculate about national-security decisions that Executive officials might make in the discharge of Article II responsibilities, without the information, expertise, or sometimes competing responsibilities of the Executive officials who make those decisions. That exercise of constitutional adjudication in the abstract would significantly trench upon the constitutional separation of powers that animate this Court's standing jurisprudence.

Respondents ultimately have proffered no non-speculative evidence indicating that their communications might be incidentally intercepted under Section 1881a-authorized surveillance targeting foreigners abroad. The most they can say is that "it is entirely possible that the surveillance [they] fear is taking place already." Br. 57 n.21. That is insufficient to establish Article III standing.

B. Respondents Have Not Established Imminent And Non-Speculative Future Surveillance Under Section 1881a

To establish Article III standing based on the contention that respondents' future communications will be collected by Section 1881a-authorized surveillance, respondents must prove that that asserted injury is imminent and non-conjectural. Gov't Br. 24-26. The Court's requirement of an "imminent" injury demands a showing that the asserted harm is "certainly impending" in order to ensure that the asserted injury "is not too speculative for Article III purposes" and to avoid adjudicating claims for which, even absent judicial action, "no injury would have occurred at all." *Id.* at 28 n.9 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992)) (emphasis omitted). "Imminence" does not rigidly limit cognizable future injuries only to those that occur within a particular timeframe. *Ibid.*; see, *e.g.*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 211-212 (1995) ("imminent" injury from minority-set-aside contracts established when injury would occur "in the relatively near future" because the plaintiff showed that it bid on "every guardrail project in Colorado" and that the State offered 1.5 such contracts on average annually). But it does require respondents to show a concrete, non-speculative future injury from government surveillance of their communications. Respondents' summary-judgment evidence falls far short of that standard.

Respondents assert (Br. 54-55) that they can establish standing by showing an "objectively reasonable likelihood of future harm," a standard they claim the Court uses "interchangeably" with "certainly impending." That is incorrect. This Court has made clear that "imminent" injury is "the standard mandated by [its] prece-

dents," *Defenders of Wildlife*, 504 U.S. at 564 n.2, and respondents themselves acknowledge that *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), indicates that "'imminence' requires more than 'a realistic threat.'" Br. 56. Although respondents suggest (*ibid.*) that this aspect of *Summers* is dictum, the Court's considered articulation of the proper standing standard is not so easily dispatched. See 555 U.S. at 499-500 (rejecting the "realistic threat" standard embraced in a dissenting opinion); see Gov't Br. 26-27. Respondents point to no case in which this Court has found standing on anything like the speculative assertions made here.

The cases respondents cite (Br. 54-56) do not support diluting the imminent-injury standard to require nothing more than an "objectively reasonable likelihood" of government conduct that will cause future harm and, instead, address situations entirely different from those here. Statutes that impose substantial sanctions to regulate a plaintiff's primary conduct by directly proscribing actions a plaintiff claims a right to take, for instance, can effectively coerce compliance by the plaintiff in a way that eliminates what would otherwise be an "imminent" threat of enforcement when the plaintiff shows a sufficiently credible threat of prosecution. Gov't Br. 27-28 (discussing *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979)); see *Pennell* v. *City of San Jose*, 485 U.S. 1, 8 (1988) (following *United Farm Workers*); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 387, 392-393 (1988). A judicial precedent declaring an official's conduct unlawful likewise causes imminent injury by coercing the prompt cessation of such conduct. *Camreta* v. *Greene*, 131 S. Ct. 2020, 2029 & n.4 (2011) (official must "change the way he performs his duties" or engage in prohibited conduct making him liable for

damages). And affirmative evidence that a litigant will take a particular harmful action can sometimes show that injury is imminent. See, *e.g.*, *Blum* v. *Yaretsky*, 457 U.S. 991, 995, 1000-1001 (1982) (finding a "sufficiently real and immediate" threat that nursing facility would discharge or transfer plaintiffs because its physician committee had already determined that they "should be transferred" to another facility) (citation omitted).[3]

The fundamental problem with respondents' position is that it relies entirely on speculation to substantiate the assertion that Section 1881a-authorized surveillance will injure them. They seek to give force to their speculation by claiming that Section 1881a authorizes dragnet surveillance that is likely to capture their communications. But to support that characterization respondents thus must conjecture about a number of matters, including (1) the government's foreign-intelligence collection interests; (2) the government's targeting decisions and priorities and whether they would lead to a decision to target respondents' contacts; (3) whether the government would conduct surveillance targeting those contacts under Section 1881a, as opposed to other authority for foreign-intelligence collection that respondents do not challenge, Gov't Br. 2-3, 32, 45-46; (4) whether the FISC would enter an order under Section 1881a based

[3] The environmental cases respondents cite rest standing on present aesthetic or recreational harms from proven conduct, not alleged future injuries. Gov't Br. 42-43 (discussing *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000)); see *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978) (finding injury in environmental and aesthetic harms from thermal pollution; observing that radiation emissions would "also seem" to constitute an injury; and "not determin[ing]" whether "'objectively reasonable' present fear and apprehension" of increased radiation are cognizable injuries).

on the relevant government certifications and procedures; (5) whether the government would be successful in collecting the targets' communications; and (6) whether the collection would incidentally acquire respondents' communications. Respondents have proffered no competent evidence on any of those matters. Their speculation about "possible future injury" is plainly insufficient. *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990).

Respondents contend (Br. 57-58, 60) that the government's position could "immuni[ze]" surveillance claims from scrutiny, because they can never be certain that communications involving them have been acquired. That contention is misplaced. Others may be able to establish standing even if respondents cannot. As respondents recognize (Br. 58), the government must provide advance notice of its intent to use information obtained or derived from Section 1881a-authorized surveillance against a person in judicial or administrative proceedings and that person may challenge the underlying surveillance. Cf. Ashcroft Amicus Br. 23 (noting challenges in other FISA contexts); Gov't Br. 8 & n.6. Electronic-communication-service providers can also challenge government directives to assist in acquisitions under Section 1881a and thereby challenge the lawfulness of the underlying surveillance activity. Indeed, such a challenge under Section 1881a's statutory predecessor resulted in a public decision by the Foreign Intelligence Surveillance Court of Review. See *ibid.*

This Court has stressed that the "significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change," counsels that federal courts "be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131

S. Ct. 1436, 1449 (2011). It is particularly important to heed that caution and reject respondents' plea for abstract adjudication of the constitutional issues presented in this case. Section 1881a may be subject to challenge in a concrete factual context. In any event, the "assumption that * * * no one would have standing" is "not a reason to find standing." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

C. Respondents' Self-Imposed Harms Are Not A Basis For Standing

Respondents contend (Br. 28-48) that, even if they have failed to establish an "imminent" and non-conjectural injury in the form of the government's *future* collection of their communications, they have established standing based on their "reasonable assumption that their communications will be monitored under" Section 1881a, which has led them to "take costly and burdensome measures" to avoid the surveillance they fear. Br. 29, 32. But such self-inflicted injuries based on subjective fears of surveillance are not cognizable Article III injuries, see Gov't Br. 38-44, and respondents have failed to show that any such harms would likely be redressed by an injunction enjoining only the subset of government surveillance conducted under Section 1881a, see *id.* at 44-47. If respondents cannot establish standing based on an imminent and non-conjectural future injury of surveillance, they cannot correct that basic defect by taking actions that cause themselves harm.

1. Respondents' self-inflicted harms do not qualify as cognizable injuries

a. Respondents restate (Br. 29-34) their assertions about a government "dragnet" of communications content into and out of the United States and their conjec-

ture that their foreign contacts are likely to be targeted for surveillance, and rely on that speculation to argue (Br. 29, 34, 41, 46) that, because they "reasonabl[y] assum[e]" that their communications will be monitored, "[t]he statute has compelled," "required," and "forced" them to take actions that cause themselves harm. That simply is not so. Section 1881a does not "compel," "require," or "force" respondents to do anything. Cf. *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972) (contrasting surveillance program to government action "regulatory, proscriptive, or compulsory in nature"). The statute does not regulate their conduct in any way; it authorizes certain government surveillance targeting foreigners overseas if the government satisfies numerous statutory requirements and the Fourth Amendment and if the FISC issues an order under Section 1881a. Respondents' declarations thus at most support the view that they have taken steps based on their own *perception* that Section 1881a creates uncertainty regarding the privacy of their electronic communications. See, *e.g.*, Pet. App. 343a-344a, 350a, 356a, 361a, 366a, 370a, 377a.

The attorney respondents also raise the argument (Br. 34-35) that they face "possible bar discipline" if they do not take prophylactic actions to protect the confidentiality of their communications with foreigners abroad. But respondents ultimately rest their arguments on the same speculative beliefs about Section 1881a-authorized surveillance, and they fail to cite any state court that has construed state ethics rules as requiring such conduct based on conjecture about, for instance, surveillance under a statute that is not directed to the attorney-client relationship, but to the targeting of persons abroad for foreign intelligence. Such a decision would be surprising and could have sweeping appli-

cation for members of the bar. Cf. N.Y. State Bar Ass'n Amicus Br. 20 (asserting that it is "reasonable to be concerned that *any* communication with a non-citizen in a country of interest to the United States might be intercepted and stored, subject to review by the government"). By contrast, more routine ethics issues that may arise—for instance, when a lawyer receives a confidential email from a client from a computer owned by the client's employer, see *id.* at 11—address contexts in which a lawyer bases his actions on knowledge of relevant facts, not speculation about what might theoretically be possible.[4]

Where, as here, claims of feared surveillance targeting persons abroad are too speculative to confer Article III standing, a state ethics rule purporting to require an attorney to take action of the sort respondents purport to take would be based on nothing more than the same speculation. Even if a state would require a lawyer to protect confidentiality in these circumstances, respondents provide no sound basis for concluding that Article III standing should be governed by the same standard.

b. Respondents' self-inflicted harms are nothing more than the product of a subjective "chill" caused by their apprehensions about surveillance under Section 1881a. As the Court held in *Laird*, such "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of * * * a threat of specific future harm," *i.e.*, "immediately threatened injury." 408 U.S. at 13-15; see Gov't Br. 40-41.

Respondents' efforts to distinguish *Laird* are without merit. They assert (Br. 45-46) that the *Laird* plain-

[4] Even in that context, the obligation is only to take "reasonable" protective measures considering cost as one factor, not to take any steps that might reduce a possible risk to confidentiality.

tiffs "failed to establish" any "injur[y] *at all*," whereas respondents showed that they have "in fact altered their conduct because of" Section 1881a. A footnote in *Laird* notes "considerable doubt" whether the plaintiffs' activities were in fact chilled, 408 U.S. at 13 n.7, but the Court did not rest its decision on that fact-bound question. The Court instead decided whether Article III jurisdiction can rest on a plaintiff's "alleg[ation] that the exercise of his First Amendment rights is being chilled" by the existence of a government surveillance activity, where the "alleged 'chilling' effect" arises from a "speculative apprehensiveness" that the government would "cause direct harm" to the plaintiff "at some future date." *Id.* at 10, 13. The Court held that such "[a]llegations of a subjective 'chill,'" like those here, are insufficient. *Id.* at 13-14.

Respondents assert (Br. 45-46) that *Laird* "found that any 'chill'" in the case "was not a reasonable response" to the challenged program. But nothing in *Laird* analyzes the reasonableness of the response, and respondents' citation to two pages in *Laird*'s factual statement (408 U.S. at 6, 9) lends no support to that theory. Respondents are likewise wrong in contending (Br. 46) that this case is distinguishable because respondents' fears are based on their view that Section 1881a will be "used precisely as it was designed"—to conduct so-called dragnet surveillance—while the *Laird* plaintiffs feared "abuse" of the program. In both contexts, the plaintiff's own behavior, which flows from the plaintiff's own "speculative apprehensiveness" of future harm, is not "an adequate substitute" for the requisite showing of a non-conjectural "specific future harm," *i.e.*, "immediately threatened injury." 408 U.S. at 13-15.

c. Respondents argue (Br. 36-44) that their own actions are "avoidance injuries" like those that this Court recognized as sufficient to confer standing in *Meese* v. *Keene*, 481 U.S. 465 (1987), *Laidlaw*, *supra*, and *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010). That is incorrect.

Keene based standing on the actual reputational injury that would result from proven government conduct —labeling three specific films as propaganda—not the cost of avoidance behavior. Gov't Br. 43. Likewise, the Article III injury in *Laidlaw* was harm to the aesthetic and recreational interests of an association's members from proven water pollution, *id.* at 42-43, not, as respondents suggest (Br. 37-38), the members' "reasonable" decisions to curtail their recreational activity. *Laidlaw*'s attention to the objective "reasonableness" of each assertion of an otherwise purely subjective "aesthetic" and "recreational" injury (a reduction in one's personal enjoyment of nature) reflects that the Court demanded proof not only that the challenged conduct "directly affected [the individuals'] recreational, aesthetic, and economic interests" but also that each individual's subjective "concerns about the effects of [the challenged] discharges" were "reasonable." 528 U.S. at 183-184.

Monsanto addressed materially different circumstances. The district court in *Monsanto* found a "reasonable probability" that the farmer plaintiffs' conventional alfalfa-seed crops would be infected by genetically modified alfalfa, based on proof that (1) the genetically modified seed was already being planted in "all" major alfalfa seed production areas, and (2) the alfalfa seed farms were "much more concentrated" than the two- to ten-mile range of their pollinating bees. 130 S. Ct. at 2754 & n.3. In that context, where the plaintiffs had

proven that modified seeds were, in fact, being planted near their crops and that a naturally occurring phenomenon (bee pollination) would distribute modified genes at distances much greater than the distances between farms, the Court concluded that the "substantial risk" of contamination "injure[d]" the farmers and accepted their representations that they would need to mitigate that risk by testing their crops and taking protective measures. *Id.* at 2754-2755.

Unlike this case, the injury in *Monsanto* was not a subjective (or even an objectively reasonable) fear of unknown decisions by government actors who, if they were to make certain decisions in certain ways, might injure the plaintiffs. *Monsanto* dealt instead with the present deleterious effects of *proven* actions that themselves, through only natural processes, produced the substantial risk of injury. That practical evaluation of the natural consequences of actual human activity lends no support to respondents' conjecture that government officials and the FISC might make decisions that could result in the incidental collection of communications involving respondents. Such "speculati[on] that [government] officials will" take harmful actions simply gives "no assurance that the asserted injury is * * * 'certainly impending'" and does not establish an Article III injury. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344-345 (2006) (citation omitted); see *Summers*, 555 U.S. at 493-500 (no standing to challenge application of regulatory authority without showing that officials have decided to apply that authority at a location that the plaintiff's members will choose to visit).

d. Respondents ultimately give no reason to treat plaintiffs who decide to incur injury any differently than similarly situated plaintiffs who do not. Gov't Br. 39.

Respondents' argument (Br. 43) that their injuries flow from "the statute itself" in fact suggests that similarly situated plaintiffs *should* be treated the same, even if some simply accept a perceived risk of surveillance without taking self-harmful acts. But that theory does not account for the dispositive weight placed by respondents and the court of appeals on respondents' assertion that they have taken costly and burdensome measures to avoid surveillance. Respondents' fall-back argument —that others who fail to take such actions are "not similarly situated" because they were not "compel[led]" to take self-harmful acts—simply confirms that respondents use the phrase "were compelled" to mean "have chosen," and that respondents therefore advocate a theory that mistakenly allows Article III jurisdiction to be manufactured "for the price of a plane ticket." Pet. App. 148a.

2. Respondents have failed to establish redressability

Even if respondents' self-inflicted injuries flowing from their asserted fear of surveillance could be an independent basis for Article III standing, respondents have failed to carry their burden of establishing a non-speculative likelihood that an injunction enjoining only Section 1881a-authorized surveillance would redress that asserted injury.

Although respondents note (Br. 49) that a plaintiff need not show that a favorable decision will relieve his every injury, respondents have given no sound reason why enjoining only Section 1881a-authorized surveillance would likely reduce their perceived need to take measures to protect the confidentiality of their communications. Such relief would leave unaffected any of the other means the government has to conduct electronic

surveillance of the communications of foreigners abroad, including authority that respondents know that the government has used to collect some communications in the past. Gov't Br. 32-33 & n.11, 44-47.

Respondents assert (Br. 51) that the "burden" of Section 1881a-authorized surveillance is "distinct" from that of other forms of surveillance, because (they believe) Section 1881a-authorized surveillance may sweep up "millions of communications" and permit surveillance "without individualized suspicion or individualized judicial review." Relieving that "burden," however, would presumably be of little comfort in light of respondents' concern with confidentiality if communications involving them would continue to face a risk of interception under different legal authorities. That risk is at least as tangible as respondents' fear of Section 1881a-authorized surveillance, because the communications that respondents describe could well be—and some have been—collected under other authority. See Gov't Br. 32-33 & n.11 (discussing prior use of traditional FISA surveillance to target the client contact of one attorney respondent); cf. N.Y. State Bar Ass'n Amicus Br. 29. If respondents' foreign contacts are, as they contend, of significant foreign-intelligence interest, respondents provide no reason to believe why they would perceive no need to protect the confidentiality of communications if only Section 1881a-authorized surveillance were terminated.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2012

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-1025

Supreme Court, U.S.
FILED
AUG 2 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, *et al.*,

Petitioners,

v.

AMNESTY INTERNATIONAL USA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF JOHN D. ASHCROFT, WILLIAM P. BARR, BENJAMIN R. CIVILETTI, EDWIN MEESE III, MICHAEL B. MUKASEY, DICK THORNBURGH, AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MEGAN L. BROWN
CLAIRE J. EVANS
MATTHEW J. DOWD
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000

RICHARD A. SAMP
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Counsel for Amici Curiae

August 2, 2012

243025

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Library of Congress
Law Library

QUESTION PRESENTED

Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a (Supp. II 2008)—referred to here as Section 1881a—allows the Attorney General and Director of National Intelligence to authorize jointly the "targeting of [non-United States] persons reasonably believed to be located outside the United States" to acquire "foreign intelligence information," normally with the Foreign Intelligence Surveillance Court's prior approval of targeting and other procedures. 50 U.S.C. § 1881a(a), (b), (g)(2) and (i)(3); *cf.* 50 U.S.C. § 1881a(c)(2). Respondents are United States persons who—by law—may not be targeted for surveillance under Section 1881a. Respondents filed this action on the day that Section 1881a was enacted, seeking both a declaration that Section 1881a is unconstitutional and an injunction permanently enjoining any foreign-intelligence surveillance from being conducted under Section 1881a. The question presented is:

Whether Respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a-authorized surveillance and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT..... 7

ARGUMENT..... 9

I. The Standing Doctrine Precludes Adjudication Of Abstract Disagreements Over National Security Policy 9

A. The requirement of a concrete factual dispute between specific adverse parties protects the separation of powers..... 9

B. Litigation over national security demands particular fidelity to Article III 11

II. Claims Such As Respondents' Should Be Properly Heard, If At All, In A Future Case Or Controversy 14

Table of Contents

Page

A. Respondents' inchoate claims present policy disagreements unsuitable for judicial resolution 14

B. Constitutional questions can and will be addressed on concrete facts by the FISC and other courts 19

III. Respondents Have Not Satisfied Article III's Particular Demands 24

A. The feared government actions are not "certainly impending" 25

B. Expenditures voluntarily undertaken to reduce the possibility of a non-immediate threat are also insufficient 28

CONCLUSION 31

TABLE OF CITED AUTHORITIES

Page

CASES

Al Shimari v. CACI International,
679 F.3d 205 (4th Cir. 2012) 14

Allen v. Wright,
468 U.S. 737 (1984) ..... *passim*

American Civil Liberties Union v. U.S. Department of Justice,
265 F. Supp. 2d 20 (D.D.C. 2003) 23

Amnesty International USA v. Clapper,
638 F.3d 118 (2d Cir. 2011) 6, 24, 26, 28

Amnesty International USA v. Clapper,
667 F.3d 163 (2d Cir. 2011) 7, 15, 29

Amnesty International USA v. McConnell,
646 F. Supp. 2d 633 (S.D.N.Y. 2009) 6

Arizona Christian School Tuition Organization v. Winn,
131 S. Ct. 1436 (2011) 9

Babbitt v. Farm Workers,
442 U.S. 289 (1979) 26

Bond v. United States,
131 S. Ct. 2355 (2011) 18

Cited Authorities

Page

Brown v. Plata,
131 S. Ct. 1910 (2011) 19

Chicago & Grand Trunk Railway Co. v. Wellman,
143 U.S. 339 (1892) 7

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 11

DaimlerChrysler Corporation v. Cuno,
547 U.S. 332 (2006) 10

Elk Grove Unified School District v. Newdow,
542 U.S. 1 (2004) 9, 11

Federal Election Commission v. Akins,
524 U.S. 11 (1998) 10

Fisher v. Halliburton,
667 F.3d 602 (5th Cir. 2012) 14

Free Enterprise Fund v. PCAOB,
130 S. Ct. 3138 (2010) 18

General Dynamics Corporation v. United States,
131 S. Ct. 1900 (2011) 13

Gordon v. Warren Consolidated Board of Education,
706 F.2d 778 (6th Cir. 1983) 17

Cited Authorities

Page

Haitian Refugee Center v. Gracey,
809 F.2d 794 (D.C. Cir. 1987) 29-30

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 12

Hein v. Freedom from Religion Foundation,
551 U.S. 587 (2007) 10

In re Directives,
551 F.3d 1004 (Foreign Int. Surv. Ct. Rev. 2008) 21

In re National Security Agency Telecommunications Records Litigation (Hepting),
671 F.3d 881 (9th Cir. 2011) 5, 14

In re National Security Agency Telecommunications Records Litigation (McMurray),
669 F.3d 928 (9th Cir. 2011) 5

In re Sealed Case,
310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002) .. 21

Laird v. Tatum,
408 U.S. 1 (1972) 16, 18, 29, 30

Lewis v. Casey,
518 U.S. 343 (1996) 9

Cited Authorities

Page

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 24, 26

Mayfield v. United States,
599 F.3d 964 (9th Cir.), *cert. denied*,
131 S. Ct. 503 (2010) 23

Mohamed v. Jeppesen Dataplan, Inc.,
614 F.3d 1070 (9th Cir. 2010) 14

O'Connor v. Ortega,
480 U.S. 709 (1987) 15

O'Shea v. Littleton,
414 U.S. 488 (1974) 25

Oliver v. United States,
466 U.S. 170 (1984) 15

Pennsylvania v. New Jersey,
426 U.S. 660 (1976) 29

Raines v. Byrd,
521 U.S. 811 (1997) 11

Rakas v. Illinois,
439 U.S. 128 (1978) 16

Schlesinger v.
Reservists Committee to Stop the War,
418 U.S. 208 (1974) 10, 11, 15

Cited Authorities

Page

Sibron v. New York,
392 U.S. 40 (1968) 16

Summers v. Earth Island Institute,
555 U.S. 488 (2009) 10

Thompson v. North American Stainless, LP,
131 S. Ct. 863 (2011) 29

United States v. Cavanagh,
807 F.2d 787 (9th Cir. 1987) 20, 23

United States v. Damrah,
412 F.3d 618 (6th Cir. 2005) 23

United States v.
Holy Land Foundation for Relief & Development,
No. 3:04-CR-240-G, 2007 WL 2011319
(N.D. Tex. July 11, 2007) 23

United States v. Jones,
132 S. Ct. 945 (2012) 15, 16

United States v. Mubayyid,
521 F. Supp. 2d 125 (D. Mass. 2007). 22, 23

United States v. Pelton,
835 F.2d 1067 (4th Cir. 1987) 23

Cited Authorities

Page

United States v. Reynolds,
345 U.S. 1 (1953) 13

United States v. Richardson,
418 U.S. 166 (1974) 10, 19

United States v. SCRAP,
412 U.S. 669 (1973) 10, 17

United States v. Stewart,
590 F.3d 93 (2d Cir. 2009), *cert. denied sub nom.*,
Sattar v. United States, 130 S. Ct. 1924 (2010) .. 23

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 16

United States v. Wen,
477 F.3d 896 (7th Cir. 2007) 23

United States v. White,
401 U.S. 745 (1971) 16

Valley Forge Christian College v. Americans United for Separation of Church & State,
454 U.S. 464 (1982) ..... *passim*

Warshak v. United States,
532 F.3d 521 (6th Cir. 2008) 15

Warth v. Seldin,
422 U.S. 490 (1975) 7

Page

Whitmore v. Arkansas,
495 U.S. 149 (1990) 26, 27

CONSTITUTION, STATUTES AND RULES

U.S. Constitution, art. III. ..... *passim*

U.S. Constitution, amend. I 5, 14, 17

U.S. Constitution, amend. IV ..... *passim*

50 U.S.C. § 1801(h)(1) 20

50 U.S.C. § 1803(a)(1) 20

50 U.S.C. § 1881a 4, 19, 25, 26

50 U.S.C. § 1881a(a) 19

50 U.S.C. § 1881a(b)(1) 25

50 U.S.C. § 1881a(b)(3) 20, 25

50 U.S.C. § 1881a(b)(5) 20, 27

50 U.S.C. § 1881a(c)(2) 19

50 U.S.C. § 1881a(d)(1) 20

50 U.S.C. § 1881a(e)(2) 20

Cited Authorities

	Page
50 U.S.C. § 1881a(g)(1)(B)	19
50 U.S.C. § 1881a(g)(2)	20
50 U.S.C. § 1881a(g)(2)(A)	4
50 U.S.C. § 1881a(g)(2)(A)(iv)	20
50 U.S.C. § 1881a(h)(6)(A)	21
50 U.S.C. § 1881a(h)(6)(B)	22
50 U.S.C. § 1881a(i)(1)(A)	20
50 U.S.C. § 1881a(i)(2)	20
50 U.S.C. § 1881a(i)(3)(A)	21
50 U.S.C. § 1881a(i)(4)(A)	21
50 U.S.C. § 1881a(i)(4)(D)	22
50 U.S.C. § 1881a(l)	22
50 U.S.C. § 1881a(l)(3)(B)	21
Sup. Ct. R. 37.6	1
FISA Amendments Act of 2008	*passim*

Page

OTHER AUTHORITIES

4 Papers of John Marshall 95 (C. Cullen ed. 1984) . 10

Cyberspace Policy Review (undated), *available at* http://www.whitehouse.gov/assets/documents/Cyberspace_Policy_Review_final.pdf 14

Department of Justice and Office of Director of National Intelligence, *Background Paper on Title VII of FISA* (2012) 22

Remarks by the President on the Signing of the FISA Amendments Act of 2008 (July 10, 2008), *available at* http://www.justice.gov/archive/ll/docs/fisa-amendments-act-2008.pdf 3

Letter from Honorable Colleen Kollar-Kotelly, Presiding Judge, FISC to Patrick Leahy, Chairman, Senate Committee on the Judiciary, 2002 WL 1949262 (Aug. 20, 2002)..... 22

Letter from Patrick Leahy, Chairman, Senate Committee on the Judiciary to Honorable Colleen Kollar-Kotelly, Presiding Judge, FISC, 2002 WL 1949260 (July 31, 2002) 22

Cited Authorities

Page

Memorandum from the Department of Justice to the Honorable Joseph R. Biden (Apr. 30, 2012), *available at* http://www.justice.gov/nsd/foia/foia_library/foia_library.htm..... 21

Memorandum from the Department of Justice to the Honorable Richard B. Cheney (Apr. 30, 2008), *available at* http://www.justice.gov/nsd/foia/foia_library/foia_library.htm 21

Memorandum from the Department of Justice to the Honorable J. Dennis Hastert (Apr. 1, 2005), *available at* http://www.justice.gov/nsd/foia/foia_library/foia_library.htm 21

National Security Strategy (May 2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf 13

National Strategy for Counterterrorism (June 2011), *available at* http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf..... 13

Remarks of Sen. Rockefeller, 154 Cong. Rec. S6465 (2008) 3

Page

S. Rep. No. 112-174 (2012). 21

MISCELLANEOUS

Brief in Opposition, *Clapper v. Amnesty International USA*, No. 11-1025 (S. Ct. Apr. 17, 2012) 5

Complaint, *Amnesty International USA v. Clapper*, No. 08-6259, Doc. 1 (S.D.N.Y. July 10, 2008) 28

Declaration of Naomi Klein, *Amnesty International USA v. Clapper*, No. 08-6259, Doc. 7-4 (S.D.N.Y. Sept. 12, 2008) 16, 17

Declaration of Joanne Mariner, *Amnesty International USA v. Clapper*, No. 08-6259, Doc. 7-5 (S.D.N.Y. Sept. 12, 2008). 16, 17, 18

Declaration of Scott McKay, *Amnesty International USA v. Clapper*, No. 08-6259, Doc. 23 (S.D.N.Y. Dec. 15, 2008). 17, 28

Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment, *Amnesty International USA v. Clapper*, No. 08-6259, Doc. 10 (S.D.N.Y. Oct. 28, 2008). 13

Cited Authorities

Page

Petition for Certiorari, *Hepting v. AT&T Corporation*, No. 11-1200 (filed Mar. 28, 2012) .. 5

Plaintiffs' Memorandum in Support of Motion for Summary Judgment, *Amnesty International USA v. Clapper*, No. 08-6259, Doc. 7 (S.D.N.Y. Sept. 12, 2008) 5-6

INTEREST OF *AMICI CURIAE*

The *amici curiae* are six former Attorneys General and a public interest law firm who believe that the standing doctrine provides important legal protections to federal government defendants who must be able to perform their duties without the distraction of litigation premised solely on a policy disagreement with their actions or the scope of their authority.[1] The existence of a concrete "case or controversy" is especially important because this litigation touches upon issues of vital importance to the security of the United States.

The *amici curiae* are concerned that the decision below relaxes the standing doctrine to such a degree that a plaintiff who disagrees with a federal law or policy can inflict upon himself some harm in order to secure a federal forum to litigate his grievance. Among other dangers, such a relaxed standing requirement will unjustifiably force the government to defend policies and statutes in the abstract before actual applications and conflicts arise, increase the risk of disclosure of confidential national security information in litigation, and expose government officials and private companies more easily to suit regarding national security activities. Each of the *amici curiae* has appeared previously in litigation concerning national security interests, and desires to provide this Court with the perspective of those who have undertaken sensitive national security activities.

---

1. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief. Letters of consent have been lodged with the Clerk.

The Honorable John D. Ashcroft served as Attorney General of the United States from 2001 to 2005.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Benjamin R. Civiletti served as Attorney General of the United States from 1979 to 1981. He also served as Assistant Attorney General for the Criminal Division from 1977 to 1978 and as Deputy Attorney General from 1978 to 1979.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counsellor to President Ronald Reagan from 1981 to 1985.

The Honorable Michael B. Mukasey served as Attorney General of the United States from 2007 to 2009. From 1988 to 2006, he served as a federal judge on the U.S. District Court for the Southern District of New York, serving as Chief Judge from 2000 to 2006.

The Honorable Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. It regularly appears in this and other federal courts to urge courts to confine themselves to deciding cases that fall

within their jurisdiction as set forth in Article III of the U.S. Constitution.

STATEMENT OF THE CASE

Litigation involving national security policy is nothing new. But in the recent past, shifting threats, seamless borders, and evolving technologies have required changes to the nature and conduct of national security activities. These changes have spurred a barrage of unnecessary and disruptive lawsuits premised on policy disagreements with the government's response to these challenges. This litigation is no exception.

This case concerns part of the FISA Amendments Act of 2008 ("FAA"), which Congress passed after vigorous debate with 69 votes in the Senate and 293 votes in the House. The goal was simple: to update the nation's intelligence tools for use in monitoring overseas threats, while protecting Americans' civil liberties and safeguarding those who assist the government. Though controversial in some quarters, the FAA was hailed by the President,[2] congressional leaders,[3] and the national

---

2. *See* Remarks by the President on the Signing of the FISA Amendments Act of 2008 (July 10, 2008) ("[The FAA] will protect the liberties of our citizens while maintaining the vital flow of intelligence."), *available at* http://www.justice.gov/archive/ll/docs/fisa-amendments-act-2008.pdf (last visited Aug. 2, 2012).

3. *See* Remarks of Sen. Rockefeller, 154 Cong. Rec. S6465 (2008) ("The [FAA] is, therefore, critical to the Nation's security, and it sets forth a legal framework to reflect the enormous changes in telecommunications technology over the last 30 years. The bill couples this improvement in foreign intelligence collection against foreign targets overseas with important protections for civil liberties, including the review by the Foreign Intelligence Surveillance Court of the targeting and minimization procedures governing these collection activities.").

security community as ensuring that the government could adapt surveillance methods to meet modern threats.

The FAA provision challenged here, Section 702, codified at 50 U.S.C. § 1881a, was designed to permit electronic surveillance of non-United States persons reasonably believed to be outside of the United States upon satisfaction of certain statutory requirements and in compliance with the Fourth Amendment. Specifically, except in limited "exigent circumstances," Section 1881a authorizes surveillance only after the Foreign Intelligence Surveillance Court ("FISC") approves "targeting" and "minimization" procedures and accepts a certification from the Attorney General ("AG") and the Director of National Intelligence ("DNI") that:

- the acquisition involves obtaining "foreign intelligence information" from an electronic service provider;
- the targeting procedures are reasonably designed to ensure that the acquisition targets only individuals who are not U.S. persons and are reasonably believed to be outside the United States;
- the minimization procedures are designed to limit access to information about U.S. persons; and
- the procedures and guidelines for surveillance are consistent with the Fourth Amendment.

50 U.S.C. § 1881a(g)(2)(A).

The FAA was immediately subjected to legal challenge, including in this lawsuit.[4] Respondents filed this suit the day of the FAA's enactment based on their fundamental disagreement with the authority and methods for conducting foreign surveillance codified in Section 1881a. Their suit is not based on how the AG, the DNI, or FISC have implemented or will implement the FAA, nor is it based on any actual targeting of their communications or contacts abroad.

Nonetheless, Respondents ask a federal court to evaluate whether Section 1881a violates the Fourth Amendment (contrary to its express terms) because it may "authorize[] the dragnet surveillance of Americans' international communications." Br. in Opp. at 1, *Clapper v. Amnesty Int'l USA*, No. 11-1025 (Apr. 17, 2012). Respondents also seek a ruling that Section 1881a violates the First Amendment because it may chill international communications, and that it violates the separation of powers by allowing the FISC to make "an abstract assessment of the general rules that will govern a [dragnet] surveillance program." Pls.' Mem. in Supp. of

---

4. Litigants also challenged Congress's decision "to empower the Attorney General to immunize from suit telecommunications companies that had cooperated with the government's intelligence gathering, including post-September 11 activities." *In re Nat'l Sec. Agency Telecomms. Records Litig. (Hepting)*, 671 F.3d 881, 891 (9th Cir. 2011). The Ninth Circuit rejected that constitutional "broadside," *see id.* at 904, and the separate claim that the provision constituted an unconstitutional taking, *see In re Nat'l Sec. Agency Telecomms. Records Litig. (McMurray)*, 669 F.3d 928 (9th Cir. 2011). The Ninth Circuit's determination in *Hepting* is the subject of a pending petition for certiorari. *Hepting v. AT&T Corp.*, No. 11-1200 (filed Mar. 28, 2012).

Mot. for Summ. J. at 49, *Amnesty Int'l USA v. Clapper*, No. 08-6259, Doc. 7 (S.D.N.Y. Sept. 12, 2008).

On cross-motions for summary judgment, Respondents' case was dismissed for lack of Article III standing. *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009). Respondents had premised standing on their asserted fear that the FAA may be implemented in a manner that could impact their communications with overseas contacts. They also relied on steps that they had taken, or planned to take, to minimize the chance that their communications would be collected should surveillance of their contacts be authorized. The District Court concluded that the asserted fears and self-inflicted avoidance measures did not satisfy Article III.

The United States Court of Appeals for the Second Circuit disagreed. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011). A panel found that the claimed injuries satisfied Article III. In its view, the avoidance costs incurred by Respondents constituted injuries-in-fact that were traceable to the FAA because the fears that prompted them were "reasonable." It was no impediment, in the panel's view, that Respondents' allegations of harm depend on posited—but unconfirmed and unspecified—activity targeted at third parties overseas. So long as Respondents could demonstrate that they reasonably fear that the government's targeting of others may result in incidental surveillance of their communications, the panel held that they are not precluded from suing for a declaration of the FAA's constitutionality.

An equally-divided court denied a petition for rehearing *en banc*, generating several strenuous dissents.

The dissenting judges detailed how the panel's innovation in Article III standing was "at odds" with this Court's precedent. *Amnesty Int'l USA v. Clapper*, 667 F.3d 163 (2d Cir. 2011). The dissenters also expressed deep concern with the conclusion that standing could rest on such scant and tenuous allegations of harm in a case where the constitutional claims were so vague and the ramifications for national security so great.

SUMMARY OF THE ARGUMENT

"The power to declare the rights of individuals and to measure the authority of governments, . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). The standing doctrine enforces these Article III limitations, which ensure that the judiciary does not superintend policy disagreements or prematurely hear potential disputes.

Standing is critical to the "proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Its role is all the more important when claims touch on sensitive national security questions. Inchoate and unnecessary litigation forces the government to focus on litigation rather than national defense, to prematurely confront hypothetical scenarios that may never occur, to risk revealing sensitive national security information, and to consider invoking other doctrines designed to apply in limited circumstances to protect national security and the separation of powers.

The Second Circuit's analysis strips Article III standing of its gatekeeping role. Respondents were afforded Article III standing based on their speculation about future government action with respect to other persons, their subjective fears about the consequences of such action, and some expenses that may minimize the possibility of such an impact should their conception of the statute prove correct and be acted upon. By permitting abstract and speculative syllogisms to substitute for actual and imminent redressable harm caused by the FAA, the panel gutted Article III and invited Respondents to litigate abstract policy disputes.

Article III's faithful application here will not "insulate the FAA from judicial review altogether." Br. in Opp. at 2. As explained below, FISA is designed to protect Respondents' rights. There is meaningful review, including of the consistency of FISA surveillance with the Fourth Amendment, through the FISC and in any appropriate as-applied litigation. In these circumstances, federal courts should not be called upon to determine the legality of Congress's careful compromise based on speculation about hypothetical activities that may—or may not—indirectly impact the Respondents.

Because Respondents do not satisfy the fundamental prerequisites of Article III standing, this Court should reverse the Second Circuit.

ARGUMENT

I. The Standing Doctrine Precludes Adjudication Of Abstract Disagreements Over National Security Policy.

A. The requirement of a concrete factual dispute between specific adverse parties protects the separation of powers.

The "law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). By "enforc[ing] the Constitution's case-or-controversy requirement,'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004), the doctrine "prevents courts of law from undertaking tasks assigned to the political branches," *Lewis v. Casey*, 518 U.S. 343, 349 (1996). It requires that "legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472.

Article III limits the federal judiciary's "Power" to the resolution of "Cases" or "Controversies"—"not questions and issues." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1441 (2011). As Chief Justice Marshall explained, "[if] the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision"—and then "[t]he division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the

judiciary." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting 4 Papers of John Marshall 95 (C. Cullen ed. 1984)).

The standing doctrine "assures that 'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)). It "prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). Standing "helps assure that courts will not pass upon . . . abstract, intellectual problems, but [will] adjudicate concrete, living contests between adversaries." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (citation omitted).

The requirement that there be a concrete dispute affecting the particular parties prevents courts from becoming "forum[s] in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *United States v. Richardson*, 418 U.S. 166, 174 (1974). Such review "would deputize federal courts as 'virtually continuing monitors of the wisdom and soundness of Executive action,' and that, most emphatically, 'is not the role of the judiciary.'" *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 612 (2007) (quoting *Allen*, 468 U.S. at 760).

This is why "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge*, 454 U.S. at 486. "The desire to obtain (sweeping relief) cannot be accepted as a substitute for

compliance with the [standing requirements]." *Schlesinger*, 418 U.S. at 221-22. The Constitution requires a concrete dispute between actually adverse parties, so that courts are not asked to "rule on important constitutional issues in the abstract." *Id.* at 222. This is true even where alleged wrongdoing is plausible or confirmed historically, but is not alleged with specificity between the particular parties. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (finding no standing despite undisputed past occurrence of challenged law enforcement activity, where individual plaintiff did not demonstrate sufficient likelihood that he would be wronged in the future).

B. Litigation over national security demands particular fidelity to Article III.

Where standing is not clearly established, a court "must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency," especially if doing so "would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). This is particularly true where, as here, "matters of great national significance are at stake." *Elk Grove*, 542 U.S. at 11.

Indeed, insistence on a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge*, 454 U.S. at 472, is vitally important in the national security context, where broad challenges have a uniquely dangerous potential to expose sensitive information and undermine efforts to secure the peace. The many "doctrines that cluster about Article

III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways," to restrain the judiciary. *Allen*, 468 U.S. at 750. But standing "is perhaps the most important of these doctrines." *Id.* It protects against judicial overreach and unwarranted litigation, and ensures that other doctrines, including the political question and state secret doctrines, retain their properly limited role in the adjudicative system.

Standing vindicates these interests in very practical terms. As *amici* Attorneys General are all too aware, the mere filing of lawsuits attacking national security activity diverts the attention of government officials. High ranking government officials and staff throughout the Executive Branch must evaluate claims, consider and make defenses and dispositive motions, and take steps to fulfill basic investigative and discovery obligations. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (explaining that litigation comes "at a cost not only to the defendant officials, but to society as a whole" through the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office").

Litigating the merits imposes still more burdens. If no particular facts bound a plaintiff's allegations, government officials must defend against any number of hypothetical scenarios. This enhances the risk that sensitive material will be made public and increases the need for government officials to turn to doctrines, like the state secrets and political question doctrines, to shield sensitive methods and strategies. But properly applied, the standing doctrine will limit litigation to "a concrete factual context" that is "conducive to a realistic appreciation of the consequences of judicial action." *Valley*

Forge, 454 U.S. at 472. This focuses scarce government resources on particularized harm, sharpens disputes over classified information, and prevents the government from unnecessarily invoking doctrines intended only for infrequent application.[5]

Adherence to Article III's standing limitations has ramifications beyond the parties to this suit. High ranking government officials are often sued in their personal capacity long after their service concludes. *See Br. of United States, Ashcroft v. Iqbal*, No. 07-1015 (2008) (explaining personal litigation burdens that extend long after the conclusion of service). Other private actors likewise face the threat of litigation. For example, in matters of national defense, "[s]ecurity at home" depends more than ever on the government's "shared efforts" with "private-sector partners." *Nat'l Security Strategy* at 18 (May 2010).[6] The government needs "the power of the private sector" in its counterterrorism efforts. *Nat'l Strategy for Counterterrorism* at 2 (June 2011).[7] And it depends on "a public-private partnership" for maintaining a "resilient

---

5. For example, the state secrets doctrine "is not to be lightly invoked," *United States v. Reynolds*, 345 U.S. 1, 7 (1953), because "[e]ach assertion of the privilege can provide another clue about the Government's covert programs or capabilities," *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1907 (2011). Here, the United States reserved the right to invoke the doctrine. *See* Defs.' Mem. in Opp. to Pls.' Mot. for Summ. J. and in Supp. of Defs.' Cross-Mot. for Summ. J. at 29 n.22, *Amnesty Int'l*, No. 08-6259, Doc. 10 (Oct. 28, 2008). Proper application of the standing doctrine should prevent the United States from having to invoke and litigate the doctrine in the face of Respondents' varied factual allegations.

6. *Available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (last visited Aug. 2, 2012).

7. *Available at* http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf (last visited Aug. 2, 2012).

information and communications infrastructure" because "[i]nformation and communications networks are largely owned and operated by the private sector." *Cyberspace Policy Review* at i (undated).[8]

An undisciplined approach to standing increases the litigation risks to high ranking officials and private actors and threatens to discourage cooperation in these vital efforts. Absent a case or controversy, private entities should not be the target of litigation seeking to change national security policies, as they recently have been.[9] Rather, the jurisdiction of the federal judiciary must be exercised only as a "last resort," *Valley Forge*, 454 U.S. at 471, and only between truly adverse parties presenting a concrete controversy.

II. Claims Such As Respondents' Should Be Properly Heard, If At All, In A Future Case Or Controversy.

A. Respondents' inchoate claims present policy disagreements unsuitable for judicial resolution.

Although Respondents frame their dispute in First Amendment, Fourth Amendment, and separation of powers terminology, their generic claims reveal their true goal. As Judge Jacobs recognized below: Respondents

---

8. *Available at* http://www.whitehouse.gov/assets/documents/Cyberspace_Policy_Review_final.pdf (last visited Aug. 2, 2012).

9. *See, e.g., Al Shimari v. CACI Int'l.*, 679 F.3d 205 (4th Cir. 2012) (challenging detention at Abu Ghraib); *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012) (challenging decisions made in light of risk of insurgent violence in Iraq); *In re Nat'l Sec. Agency Telecomms. Records Litig. (Hepting)*, 671 F.3d 881 (9th Cir. 2011) (challenging FISA); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (challenging extraordinary rendition program).

want to "claim a role in policy-making." *Amnesty Int'l*, 667 F.3d at 203 (dissenting from denial of rehearing en banc). Should their broad claims proceed, Respondents would force the judiciary to "rule on important constitutional issues in the abstract." *Schlesinger*, 418 U.S. at 222. This is precisely what the standing doctrine is designed to prevent.

Fourth Amendment claims are inherently fact- and context-dependent, making Respondents' speculation particularly ill-suited for judicial resolution. "The Fourth Amendment is designed to account for an unpredictable and limitless range of factual circumstances, and accordingly it generally should be applied after those circumstances unfold, not before." *Warshak v. United States*, 532 F.3d 521, 531 (6th Cir. 2008) (en banc). While the judiciary "may have to grapple with these 'vexing problems' in some future case . . . there is no reason for rushing forward to resolve them" before they even occur. *United States v. Jones*, 132 S. Ct. 945, 954 (2012).

Facial challenges under the Fourth Amendment are disfavored for good reason. There is "no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). Nor does any "single factor determine[] whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant." *Oliver v. United States*, 466 U.S. 170, 177 (1984). Even slightly different fact patterns can yield different results. *See Jones*, 132 S. Ct. at 950-53. "The constitutionality of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual

context of the individual case." *Sibron v. New York*, 392 U.S. 40, 59 (1968). "[T]horny problems" presented by particular factual situations should be confronted as they arise, *Jones*, 132 S. Ct. at 954, rather than predicted and decided without need, *see Allen*, 468 U.S. at 752 (pointing to standing's role in ensuring the "gradual clarification of the law through judicial application").

The speculation required to unwind Respondents' claims is especially pronounced because it is not clear what Fourth Amendment rights they assert. They seem to allege injury to residents of foreign countries. *See, e.g.*, Decl. of Naomi Klein at ¶ 8, *Amnesty Int'l*, No. 08-6259, Doc. 7-4 (Sept. 12, 2008); Decl. of Joanne Mariner at ¶ 10, *Amnesty Int'l*, No. 08-6259, Doc. 7-5 (Sept. 12, 2008). But "the Fourth Amendment has no application" to non-citizens living abroad, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 275 (1990), and, in any event, "Fourth Amendment rights are personal" and "may not be vicariously asserted," *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (citation omitted).

Respondents also appear to assert their own Fourth Amendment interests, although they do not clarify how their rights are violated by incidental collection during surveillance that is unquestionably lawful as to its overseas target. *Cf. United States v. White*, 401 U.S. 745, 751-53 (1971). But even if some conceivable collection could violate their rights, the standing doctrine should protect courts from having to decide the question in the abstract. "[T]he federal courts . . . do not render advisory opinions," *Laird v. Tatum*, 408 U.S. 1, 14 (1972) (citation omitted), and should not opine on whether hypothetical incidental interception of communications to or from foreign terrorism suspects, foreign "guerillas," "indigenous groups," "advocates,"

or "people all over the world" could violate the Fourth Amendment rights of American attorneys, reporters, or human rights advocates. *See* Decl. of Scott McKay at ¶¶ 5-7, *Amnesty Int'l*, No. 08-6259, Doc. 23 (Dec. 15, 2008); Decl. of Klein at ¶ 6; Decl. of Mariner at ¶ 7.

The policy-driven nature of Respondents' complaints about hypothetical surveillance is particularly stark when compared to the specific inquiries the FISC confronts. As detailed *infra*, Section II.B., the FISC considers specific requests for surveillance under Section 702 based on representations by the AG and DNI that enable the FISC to review statutory and constitutional compliance. By contrast, Respondents seek an immediate judicial ruling based on sweeping allegations of possible "dragnet" surveillance that they cannot allege has occurred or is likely to occur. On such a claim, they are no more than "concerned bystanders" and cannot invoke the Court's jurisdiction. *SCRAP*, 412 U.S. at 687.

Respondents' novel First Amendment claim is a similarly abstract conduit for their policy arguments. They invoke several strains of First Amendment jurisprudence, from overbreadth to vagueness, but their claim appears to merely repackage the Fourth Amendment challenge. And, even if that were appropriate,[10] Respondents have provided the Court with no factual context for use in balancing the governmental interests involved and the means selected against whatever speech is stake.

---

10. *But see Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 781 n.3 (6th Cir. 1983) (explaining that surveillance, which falls under the Fourth Amendment, "does not violate First Amendment rights, even though it may be directed at communicative or associative activities").

Respondents' allegations are even more attenuated than the allegations found insufficient in *Laird*, where this Court held that "the jurisdiction of a federal court [could not] be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity." 408 U.S. at 10. As in *Laird*, the standing doctrine prevents Respondents from using the courts "to probe into the [government]'s intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate." *Id.* at 14.

Similarly, Respondents' separation of powers challenge confirms they present no concrete dispute. They do not allege that they have been subjected to any interception under the FAA or that such surveillance is imminent. Their gripe is with the regime itself. But an individual may not "invoke separation-of-powers or checks-and-balances constraints" unless he or she has suffered a sufficient and particularized harm. *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *see also Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3151 (2010) (considering separation-of-powers claim brought by a firm audited and investigated under the challenged regime). "Individuals have 'no standing to complain simply that their Government is violating the law.'" *Bond*, 131 S. Ct. at 2366 (quoting *Allen*, 468 U.S. at 755). Absent evidence that Respondents have been, or are imminently likely to be, subject to surveillance under Section 1881a, this claim also amounts to a mere generalized complaint about government policy.

Section 1881a is scheduled to sunset at the end of 2012 and presently is being debated. This Court should reject Respondents' attempt to convert their policy arguments favoring the law's sunset or amendment into a federal lawsuit.

B. Constitutional questions can and will be addressed on concrete facts by the FISC and other courts.

That Respondents lack standing here does not mean that the constitutionality of FISA surveillance will never be considered or subject to judicial review. To the contrary, the system requires oversight and judicial review to protect civil rights on an as-applied basis.[11]

Before surveillance occurs,[12] FISA includes significant procedural and substantive protections with which good faith compliance is presumed. *See Brown v. Plata*, 131 S. Ct. 1910, 1965 (2011).

---

11. To be sure, unreviewability would not provide Respondents with standing they do not have. As this Court noted, "the absence of any particular individual or class to litigate" particular claims "gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process," rather than the courts. *See United States v. Richardson*, 418 U.S. 166, 179 (1974).

12. If the AG and the DNI determine that "exigent circumstances" exist, they may authorize foreign intelligence surveillance to commence but they must submit the full certification for FISC review and authorization "as soon as practicable but in no event later than 7 days after such determination is made." 50 U.S.C. § 1881a(a), (c)(2), (g)(1)(B).

The AG and the DNI must present the FISC with a certification that requested surveillance will be conducted in a manner "consistent with the requirements of the fourth amendment to the Constitution of the United States." 50 U.S.C. § 1881a(g)(2)(A)(iv). The statute requires targeting procedures "reasonably designed to ensure" that only foreign communications will be obtained, and that United States persons are not targets. *Id.* § 1881a(b)(3), (b)(5), (d)(1), (g)(2). The Executive must implement procedures that "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." *Id.* §§ 1881a(e)(2), (g)(2)(A)(iv), 1801(h)(1).

The FISC's Article III judges are appointed by the Chief Justice. *Id.* § 1803(a)(1). They are "federal district judges, and as such they are insulated from political pressures by virtue of the protections they enjoy under article III." *United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987).

The FISC reviews each application to ensure that it is authorized by the statute and its procedures are consistent the Fourth Amendment. 50 U.S.C. § 1881a(i)(1)(A). The FISC makes a case-by-case determination that: (a) the certification contains all required elements, (b) the targeting procedures are reasonably designed to ensure that the target and all recipients of the communication are outside the United States, and (c) the minimization procedures are adequate. *Id.* § 1881a(i)(2). The FISC independently confirms that surveillance procedures comport with the

Fourth Amendment. *Id.* § 1881a(i)(3)(A).[13] The FISC can require that the government "correct any deficiency." *Id.* § 1881a(l)(3)(B). Also, over the years, the FISC has substantively modified hundreds of FISA applications.[14]

The FISC Court of Review, consisting of three federal district or appeals court judges, can review FISC orders and directives at the request of the government or specified third parties. *See, e.g., id.* § 1881a(h)(6)(A), (i)(4)(A). The Court of Review has considered whether earlier amendments to FISA were "consistent with the Fourth Amendment." *In re Sealed Case*, 310 F.3d 717, 736 (Foreign Int. Surv. Ct. Rev. 2002); *see also In re Directives*, 551 F.3d 1004, 1006 (Foreign Int. Surv. Ct. Rev. 2008) ("[T]he petition [for review] requires us to weigh the nation's security interests against the Fourth Amendment privacy interests of United States persons."). The Court of Review in those cases permitted third parties, including the ACLU, to submit briefs as *amici curiae*, *see Sealed Case*, 310 F.3d at 737, and evaluated petitions by non-governmental entities, *see Directives*, 551 F.3d at

---

13. A recent report by the Senate Select Committee on Intelligence on the FAA Sunsets Extension Act of 2012 noted that "the FISA Court . . . has repeatedly held that collection carried out pursuant to the Section 702 minimization procedures used by the government is reasonable under the Fourth Amendment." S. Rep. No. 112-174 at 5-6(2012).

14. *See, e.g.*, Mem. from the Dep't of Justice to the Hon. Joseph R. Biden (Apr. 30, 2012); Mem. from the Dep't of Justice to the Hon. Richard B. Cheney (Apr. 30, 2008); Mem. from the Dep't of Justice to the Hon. J. Dennis Hastert (Apr. 1, 2005), *all available at* www.justice.gov/nsd/foia/foia_library/foia_library.htm (last visited Aug. 2, 2012).

1008, when reviewing the constitutionality of particular applications of FISA. Additionally, the Supreme Court can exercise certiorari review over Court of Review decisions. *See, e.g.*, 50 U.S.C. § 1881a(i)(4)(D), (h)(6)(B).

In light of all this, "judicial review of FISA applications . . . is far from a meaningless rubber-stamp." *United States v. Mubayyid*, 521 F. Supp. 2d 125, 136 (D. Mass. 2007).

Beyond the judiciary, Executive and Legislative review ensures ongoing compliance with the statute and the Constitution. "Oversight of activities conducted under [FAA] section 702 begins with components in the intelligence agencies themselves, including their Inspectors General." Dep't of Justice and Office of Dir. of Nat'l Intelligence, *Background Paper on Title VII of FISA* at 3 (2012). The Justice Department and the DNI "routinely review the agencies' targeting decisions" at least once every 60 days. *Id.*

Several congressional committees conduct oversight, including by reviewing the required annual and semi-annual compliance reviews. 50 U.S.C. § 1881a(l). Congress engages directly with the FISC[15] and relevant Executive Branch officials, and can receive briefings, along

15. *See, e.g.*, Letter from Patrick Leahy, Chairman, Sen. Comm. on the Judiciary to Hon. Colleen Kollar-Kotelly, Presiding Judge, FISC, 2002 WL 1949260 (July 31, 2002) (inquiring about FISC internal rules of procedure); Letter from Hon. Colleen Kollar-Kotelly, Presiding Judge, FISC to Patrick Leahy, Chairman, Sen. Comm. on the Judiciary, 2002 WL 1949262 (Aug. 20, 2002) (answering questions).

with appropriate access to classified FISC opinions and related pleadings.

Finally, judicial review of the statute and its constitutionality can be obtained on an as-applied basis in appropriate circumstances. For example, in various criminal proceedings, defendants have challenged the constitutionality of FISA—unsuccessfully—in connection with suppression motions seeking to exclude evidence obtained from the electronic surveillance. *See, e.g.*, *United States v. Stewart*, 590 F.3d 93, 125-29 (2d Cir. 2009), *cert. denied sub nom. Sattar v. United States*, 130 S. Ct. 1924 (2010); *United States v. Wen*, 477 F.3d 896, 898 (7th Cir. 2007); *United States v. Damrah*, 412 F.3d 618, 625 (6th Cir. 2005); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787, 790-92 (9th Cir. 1987); *Mubayyid*, 521 F. Supp. 2d at 135-37; *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-G, 2007 WL 2011319, at *5-6 (N.D. Tex. July 11, 2007).

Surveillance authorized by FISA has also been challenged in the context of a Freedom of Information Act request, *see Am. Civil Liberties Union v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20, 31-32 (D.D.C. 2003), and in a declaratory judgment action brought by a suspect in the 2004 Madrid train bombings who was "subjected to surveillance, searches, and seizures authorized by FISA and the FISC," *Mayfield v. United States*, 599 F.3d 964, 966, 970 (9th Cir.), *cert. denied*, 131 S. Ct. 503 (2010).

The fact that Respondents want their own day in court does not diminish the practical superiority or constitutional necessity of awaiting a proper case or controversy that satisfies Article III.

III. Respondents Have Not Satisfied Article III's Particular Demands.

The government has explained why the evidence proffered by Respondents is insufficient under the elements of standing—injury-in-fact, traceability, and redressibility. These "are not mere pleading requirements but rather an indispensable part of the plaintiff's case," so "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). *Amici* will not repeat the government's arguments, but emphasize a few crucial deficiencies in Respondents' showing.

As an initial matter, by relying heavily on their assertion that there are no contested facts that are material to their standing claims, Respondents misperceive their burden. *See* Br. in Opp. at 9, n.6 ("[T]he government clarified that it was accepting the factual submissions of the plaintiffs as true for purposes of these motions.'") (quoting Pet. App. 77a). As the "part[ies] invoking federal jurisdiction," Respondents "bear[ ] the burden of establishing" standing. *Lujan*, 504 U.S. at 561. They cannot rest on "mere allegations," but must set forth "specific facts" to support their standing. *Id.* Respondents have not satisfied that requirement. Their pleadings and declarations indicate that they merely "*believe*" that some of their overseas communications "will *likely* be" subject to surveillance because they *think* that the FAA can be interpreted to "allow[] the executive branch sweeping and virtually unregulated authority to monitor the international communications . . . of law-abiding U.S. citizens and residents." *Amnesty Int'l*, 638 F.3d at 126-27.

Such allegations are far "into the area of speculation and conjecture." *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). Respondents have no evidence or allegation that they have, in fact, been subjected to surveillance under the FAA, or that any such surveillance is imminent. Their fear, coupled with expenditures that they choose to incur, does not to transform their policy disagreement into a case or controversy.

A. The feared government actions are not "certainly impending."

Respondents rely on their "fear" and belief that their international communications will be incidentally intercepted under Section 1881a, although they concede that they are not permissible targets of surveillance under that statute. They are "United States person[s]" (by virtue of U.S. citizenship) within the FAA who may not be "intentionally target[ed]" for electronic intercepts under Section 1881a. 50 U.S.C. § 1881a(b)(1), (3). As Respondents concede, their communications will not be intercepted under Section 1881a unless the AG and DNI target *other* individuals with whom Respondents happen to engage in overseas electronic communications.

Indeed, for Respondents' feared incidental interception to materialize, a series of events involving independent actors must occur including: (1) government officials, including but not limited to the named defendants, must decide to target suspected overseas terrorists who are not U.S. citizens; (2) the FISC must approve the surveillance request without limiting its targeting or minimization measures; and (3) the overseas individuals must decide to communicate, and must actually communicate, with

Respondents at a time when Section 1881a surveillance is occurring.

Because Respondents are not "an object of the action (or foregone action) at issue," and the actions of independent actors are key to their claim, this Court requires "much more." *Lujan*, 504 U.S. at 561-62. Respondents must show that "the unfettered choices made by independent actors not before the courts"—such as the AG, DNI, and judges on the FISC—"whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict . . . will be made in such manner as to produce causation and permit redressability of injury" with respect to Respondents. *Id.* at 562 (citations omitted). This standard is "substantially more difficult" to meet. *Id.* (citations omitted).

Indeed, because of the chain of events required to support Respondents' "fear," Respondents cannot show that any "injury in fact" from the FAA is "certainly impending," as required. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citation omitted). In this regard, the Second Circuit held Respondents to an impermissibly low standard, finding that they need only "show a realistic danger" of surveillance. *Amnesty Int'l*, 638 F.3d at 135. As this Court "ha[s] said many times before and [should] reiterate today: Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact." *Whitmore*, 495 U.S. at 158 (1990) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

The *Whitmore* Court's refusal to find standing based on a speculative string of events confirms that what Respondents' "fear" is not "certainly impending." For the

petitioner in *Whitmore* to establish standing, he needed to show, among other things, that state judges would reach particular decisions on review of his capital case and separately in the case of another inmate on death row, and that those decisions would negatively impact his legal rights on a possible future appeal. *See id.* at 156-57. The Court explained that the petitioner had not shown that "specific and perceptible harms . . . would befall [him] imminently." *Id.* at 159. The Court rejected the claim *not* because the Court found that the "string of occurrences" could *never* occur, but because the petitioner could not allege that they "would happen immediately" given their dependence on the results of judicial review. *Id.* In such a situation, it was "just not possible for a litigant to prove in advance that the judicial system will lead to any particular result." *Id.*

Respondents similarly have not and cannot show that the feared future foreign surveillance which could incidentally intercept their communications is "certainly impending." As in *Whitmore*, the "string of occurrences" that must occur includes particular outcomes of subsequent judicial proceedings—only here, judicial review is designed to *prevent* the harm that Respondents fear. *See* 50 U.S.C. § 1881a(b)(5) ("An acquisition authorized . . . shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.").

The chain of speculation required to give Respondents standing is evident from their Complaint, which "does not make—and could not responsibly make—a . . . claim of immediate harm." *Whitmore*, 495 U.S. at 159. Respondents frame the source of their fear in terms of what they "believe" officials may seek to authorize under the FAA, and what the FISC may conceivably approve.

Their allegations turn on what they think the outer limit of the FAA "permits," Compl. ¶ 3, *Amnesty Int'l*, No. 08-6259, Doc. 1 (July 10, 2008), which third parties they speculate the government "is likely to target," *id.* at ¶ 46, and what they fear government officials, including the FISC, "may authorize," *id.* at ¶ 36. Their declarations are similarly based on how they are "concerned" the FAA will be interpreted and applied. *See* Decl. of Mariner at ¶ 11 ("I am concerned that now the U.S. government may be able to engage in almost entirely unsupervised surveillance."); Decl. of McKay at ¶ 8 ("I believe that the government will monitor my communications under the FAA."). But just because "nothing in the Act forecloses" conceivable actions, Compl. ¶ 40, does not mean that the government will take those or any other actions—let alone that it will do so in the imminent future.

Respondents have not made an adequate showing regarding the immediacy of government action giving rise to their fears. Those fears may be sincere, but they cannot support standing because they are too attenuated from any allegation of an actual or imminent threat of incidental interception.

B. Expenditures voluntarily undertaken to reduce the possibility of a non-immediate threat are also insufficient.

Respondents also assert that the cost of taking steps to reduce the possibility of incidental surveillance—such as traveling to meet a correspondent rather than communicating by wire—supports Article III standing here. *Amnesty Int'l*, 638 F.3d at 140. But these self-imposed costs cannot support standing because they

are not "caused by the defendant." *See Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869 (2011). They are instead the result of Respondents' decision to incur costs in response to a speculative, non-imminent fear, *see supra*, Section III.A.

This Court has never permitted plaintiffs to "bootstrap" themselves into Article III standing by expending funds to ward off a non-immediate, indirect threat. Rather, "[n]o [plaintiff] can be heard to complain about damage inflicted by its own hand." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Where "[t]he injuries to the plaintiffs[] . . . were self-inflicted, resulting from [their own] decisions," standing does not lie. *Id.* Any other standard would, as Judge Raggi recognized below, allow plaintiffs to manufacture standing "for the price of a plane ticket." *Amnesty Int'l*, 667 F.3d at 180 (dissenting from denial of reh'g en banc).

Similarly, when plaintiffs merely allege that a statute, not targeted at them, nonetheless has a "chilling effect" on actions that they previously engaged in, this Court has found that standing is absent. *Laird*, 408 U.S. at 3. An "individual's knowledge that a governmental agency was engaged in certain activities" and "fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual" such that they have changed their conduct in response, is not enough to invoke the authority of the courts. *Id.* at 11. Indeed, "[g]iven the complexity and interdependence of our society and governmental policies, it will often be possible to allege with some plausibility that a change in a governmental policy is likely to cause" a change in behavior. *Haitian Refugee Ctr. v. Gracey*, 809

F.2d 794, 805 (D.C. Cir. 1987) (citation omitted). Should such claims be "accepted as sufficient to confer standing, courts would be thrust into a far larger role of judging governmental policies than is presently the case, or than seems desirable." *Id.*

Respondents' decision to incur expenses in response to the FAA's enactment cannot create standing that is otherwise absent. Permitting standing to be created so easily "would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs" established by Congress and implemented by the Executive. Without specific facts concerning actual government activity, judges would have to opine on the programs' overall "wisdom and soundness." *Allen*, 468 U.S. at 760 (quoting *Laird*, 408 U.S. at 15). And that, most definitely, "is not the role of the judiciary." *Id.*

CONCLUSION

Respondents seeks a federal judicial opinion about novel legal theories, based on indirect injuries from government activities they fear but have not alleged are or will be occurring, imminently or otherwise. This case is unfit for judicial resolution. The judgment below should be reversed.

Respectfully submitted,

MEGAN L. BROWN
CLAIRE J. EVANS
MATTHEW J. DOWD
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000

RICHARD A. SAMP
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Counsel for Amici Curiae

August 2, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1025

SEP 21 2012

IN THE

Supreme Court of the United States

JAMES R. CLAPPER, JR.,
DIRECTOR OF NATIONAL INTELLIGENCE, *ET AL.*,
Petitioners,

v.

AMNESTY INTERNATIONAL USA, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION, *ET AL.*, IN SUPPORT OF RESPONDENTS

Carmine D. Boccuzzi
(*Counsel of Record*)
Michael R. Lazerwitz
Frances Mejia
Liana R. Vitale
Christopher P. DeNicola
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
cboccuzzi@cgsh.com

Counsel for Amici Curiae

September 21, 2012

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT	7
I. THE THREAT OF SURVEILLANCE DIRECTLY HARMS PEOPLE WHO REASONABLY BELIEVE THEY ARE SUBJECT TO GOVERNMENT MONITORING	8
II. THE ECHR HAS HELD THAT PLAINTIFFS POTENTIALLY SUBJECT TO SURVEILLANCE MAY CHALLENGE SUCH SURVEILLANCE	15
A. Background on the ECHR and its Surveillance Jurisprudence	16
B. ECHR Analysis of Admissibility in Surveillance Cases	19
CONCLUSION	25

TABLE OF AUTHORITIES

Page(s)

Rules and Statutes

50 U.S.C. § 1881a 2

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 .....16-17, 19

Cases

Amnesty Int'l U.S.A. v. Clapper, 638 F.3d 118 (2d Cir. 2011) 8-9, 15

Davis v. FEC, 554 U.S. 724 (2008) 22

Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59 (1978) 8, 22, 23

Iordachi and Others v. Moldova, Eur. Ct. H.R. (Sept. 14, 2009) .....*passim*

Klass v. Germany, 28 Eur. Ct. H.R. (ser. A) (1978) 17

Lambert v. France, 1998-V Eur. Ct. H.R. 2231 .....17-18, 22-24

Mass. v. EPA, 549 U.S. 497 (2007) 8

Pennell v. City of San Jose, 485 U.S. 1 (1988) 22

Page(s)

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) 8

Other Authorities

Timothy Garton Ash, *The File: A Personal History* (1997) 13-14

Carl Botan, *Communication Work and Electronic Surveillance: A Model for Predicting Panoptic Effects*, Communications Monographs (1996) 9

Mary Fulbrook, *Anatomy of a Dictatorship: Inside the GDR 1949 - 1989* (1995)..... 10

Mary Fulbrook, *The People's State: East German Society from Hitler to Honecker* (2005) 10

Anna Funder, *Stasiland: Stories from Behind the Berlin Wall* (2002)..... 14-15

Marie Jahoda & Stuart W. Cook, *Security Measures and Freedom of Thought*, 61 Yale L.J. 296 (1952)..... 10

Kati Marton, *Enemies of the People: My Family's Journey to America* (2009) 11-13

Stephen D. Webb, *Privacy and Psychosomatic Stress: An Empirical Analysis*, 6 Soc. Behavior & Personality 227 (1978)..... 9-10

Page(s)

Gabriela Zanfir, 'Big Brother' in a Post-Communist Era (Apr. 20, 2012)..... 9

INTEREST OF AMICI CURIAE[1]

Amici curiae the Canadian Civil Liberties Association, the Center for Legal and Social Studies (Argentina), the Egyptian Initiative for Personal Rights, the Hungarian Civil Liberties Union, the Irish Council for Civil Liberties, the Kenya Human Rights Commission, the Legal Resources Centre (South Africa), the National Council for Civil Liberties (United Kingdom), Kim Lane Scheppele, Gábor Halmai, and János Kenedi respectfully submit this brief in support of respondents. Amici are international human rights organizations and individuals devoted to protecting civil liberties—including freedom from unchecked government surveillance and the right to challenge such surveillance—as well as gathering and analyzing information related to historical violations of civil liberties. Amici have unique knowledge and experiences in connection with government surveillance. In our view, the threat of surveillance directly harms people who reasonably believe they are subject to such surveillance and people who may be subject to surveillance will inevitably alter their behavior. A key protection against this type of harm is a meaningful opportunity to challenge the legal framework

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.3(a).

that creates the threat of surveillance. Amici's perspectives confirm the respondents have the requisite standing to challenge the validity of Section 702 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1881a, hereinafter the "FAA"). A summary description of each amicus follows.

The Canadian Civil Liberties Association. The Canadian Civil Liberties Association is a Canadian non-governmental organization ("NGO") that was constituted in 1964 to promote respect for and observance of fundamental human rights and civil liberties. Its work, which includes research, public education, and advocacy aims to defend and ensure the protection and full exercise of those rights and liberties.

The Center for Legal and Social Studies (Centro de Estudios Legales y Sociales) ("CELS"). CELS is a NGO that has been working since 1979 in the promotion and protection of human rights and to strengthen the democratic system in Argentina. CELS' main objectives focus on: reporting human rights violations; influencing the policy-making process based on respect for fundamental rights, promoting legal and institutional reforms designed to improve the quality of democratic institutions, and promoting an increased exercise of these rights by the most vulnerable sectors of society. CELS' strategies in the international and national arenas include strategic litigation; the building of coalitions, alliances and networks; advocacy-oriented policy research; foreign policy monitoring; and advocacy and media work. CELS also promotes

standard-setting at the international and regional levels.

The Egyptian Initiative for Personal Rights ("EIPR"). EIPR is an independent rights NGO. It has worked since 2002 on strengthening and protecting basic rights and freedoms in Egypt, through research, advocacy, and litigation in the fields of civil liberties, economic and social justice, democracy and political rights, and criminal justice.

The Hungarian Civil Liberties Union ("HCLU"). HCLU is a non-profit human rights NGO established in Budapest, Hungary in 1994. HCLU is a law reform and legal defense public interest NGO in Hungary which works independently of political parties and the Hungarian government and its institutions. HCLU's aim is to promote the case of fundamental rights and principles set forth in the Constitution of the Republic of Hungary and international conventions. HCLU's general goal is building and strengthening civil society and the rule of law in Hungary and the Central Eastern European region. HCLU is guided by its belief in the principle that citizens have a right to control the use of their personal data and that they should have access to documents of public interest.

The Irish Council for Civil Liberties ("ICCL"). ICCL is Ireland's leading independent human rights NGO, which monitors, educates, and campaigns in order to secure full enjoyment of human rights for everyone. Founded in 1976 by Mary Robinson and others, ICCL has played a leading role in some of Ireland's most successful human

rights campaigns. These have included campaigns to establish an independent Garda Ombudsman Commission, legalize the right to divorce, secure more effective protection of children's rights, decriminalize homosexuality, and introduce enhanced equality legislation. Since 1976, ICCL has lobbied the Irish government to ensure the full implementation of international human rights standards in Ireland.

The Kenya Human Rights Commission ("KHRC"). KHRC is a Kenyan NGO founded in 1991 with the aim of defending human rights and advocating for political reforms in Kenya. KHRC's mission is to work towards the respect, protection, and promotion of all human rights for all individuals and groups. This is achieved through strategies and actions aimed at entrenching human rights and democratic values by facilitating and supporting individuals, communities, and groups to claim and defend their rights by holding state and non-state actors accountable for the actions.

The Legal Resources Centre ("LRC"). LRC is a human rights NGO in South Africa. LRC seeks to use the law as an instrument of justice for the vulnerable and marginalized, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability, or by reason of social, economic, and historical circumstances. Inspired by South Africa's history, its constitution, and international human rights standards, LRC is committed to a fully democratic society based on the principle of substantive

equality and to ensure that the principles, rights, and responsibilities enshrined in South Africa's constitution are respected, promoted, protected, and fulfilled.

The National Council for Civil Liberties ("Liberty"). Liberty is one of the United Kingdom's leading civil liberties and human rights NGOs. Liberty was founded in 1934 and has since worked to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning, and research.

Individual Amici. Kim Lane Scheppele is the Director of the Program in Law and Public Affairs at Princeton University and Laurance S. Rockefeller Professor of Sociology and International Affairs in the Woodrow Wilson School and the University Center for Human Values. Gábor Halmai is a Professor of Law and Director of the Institute for Political and International Studies at Eötvös Lóránd University, Budapest, Hungary, as well as Director of the Hungarian Human Rights Information and Documentation Center. János Kenedi is a Research Fellow at the Institute for the History of the 1956 Hungarian Revolution.

Amici are concerned that the expansive power created under the FAA and the insufficient safeguards attached thereto may give rise to the monitoring of their communications. By way of example, since the tragic events of September 11, 2001, Liberty has been heavily involved in litigation, lobbying, and campaigning work relating to the counter-terrorism practices, policies, and laws undertaken by

both the U.K. and U.S. governments. Just as the U.K. and U.S. governments have collaborated in fighting terrorism, Liberty has collaborated closely with civil rights bodies in the United States to challenge those policies Liberty believes unnecessarily infringe fundamental rights and freedoms. Regular communication with human rights groups based in the United States is essential for the effectiveness of Liberty's work and such communications typically relate to sensitive matters that Liberty wishes to remain confidential, such as litigation strategy, advocacy, political engagement, and the organization and timing of campaigns. Liberty is accordingly concerned that staff members' communications with sister human rights organizations in the United States will be surveilled simply because the United Kingdom is of foreign policy interest. The possibility that Liberty's communications with its U.S. counterpart organizations could be monitored by the U.S. government is of grave concern to Liberty.

Knowing that Liberty's communications with U.S.-based organizations on these substantive issues and accompanying strategy could be intercepted by the United States makes Liberty less likely to communicate with its U.S. colleagues. That is because Liberty's private and sensitive communications about which many of Liberty's campaigns indirectly relate could be intercepted by the U.S. government and because, once intercepted, Liberty's communications could be passed to the U.K. authorities, to whom all of Liberty's campaigning

activity relates. Liberty's position exemplifies the manner in which respondents' foreign contacts will likely respond to the threat of surveillance under the FAA.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Technological advances have vastly increased the ease with which massive amounts of personal information can be collected and processed, but the threat of pervasive government surveillance is nothing new. Historical experience has demonstrated that where surveillance is reasonably likely, people modify their behavior. Measures taken to avoid surveillance or mitigate its effects were and are a direct consequence of potential government monitoring of communications—particularly when the communications in question concern confidential or otherwise sensitive issues. Respondents here fear that the broad monitoring through mass surveillance orders that the FAA authorizes makes it likely their communications will be monitored. They have thus taken reasonable measures to insulate their communications from such surveillance. Petitioners' attempt to dismiss these injuries as "self-inflicted" runs counter to historical experience, applicable social science, and common sense.

Because the standing issues before this Court implicate questions concerning the harm suffered by individuals subject to the threat of surveillance, the firsthand experience of individuals exposed to the threat of surveillance in other historical circum-

stances is of particular relevance. Similarly, the decisions of the European Court of Human Rights (the "ECHR"), which is closer to this history, also merit this Court's attention. The ECHR's decision on a similar challenge to Moldova's grant of power to Moldovan authorities to intercept certain telephone communications is illustrative. In *Iordachi and Others v. Moldova*, the ECHR held that applicants who had not been targets of surveillance nevertheless could assert their claims where they had extensive contact with persons that Moldovan authorities were authorized to wiretap and where they were "at the material time potentially at risk of being subjected to such measures."[2] This position is consistent with this Court's standing doctrine, which allows plaintiffs to challenge government behavior that injures them even if they are not directly targeted.[3]

I. THE THREAT OF SURVEILLANCE DIRECTLY HARMS PEOPLE WHO REASONABLY BELIEVE THEY ARE SUBJECT TO GOVERNMENT MONITORING

The surveillance the FAA authorizes injures respondents "by compelling them to take costly and burdensome measures to protect the confidentiality of their international communications and by

---

[2] *Iordachi v. Moldova*, Eur. Ct. H.R. (Sept. 14, 2009) at 15.

[3] *See, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 679, 686-90 (1973); *Mass. v. EPA*, 549 U.S. 497, 516-26 (2007); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 73-78 (1978).

compromising their ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and to engage in other legitimate and constitutionally protected communications."[4] Historical experience bears out the fact that the threat of surveillance injures those who reasonably believe they may be monitored. Over the last several decades, social scientists have conducted extensive research concerning the effects of government surveillance on individuals. Psychological studies confirm that perceptions of surveillance or a lack of privacy are correlated with psychological stress and altered behavior.[5] This research confirms that the threat of

---

[4] *Amnesty Int'l U.S.A. v. Clapper*, 638 F.3d 118, 133 (2d Cir. 2011) (internal quotations omitted).

[5] For example, a workplace study conducted statewide in New Jersey found a direct correlation between workers' perceptions of surveillance and negative sentiments concerning privacy, role in the work place, self-esteem, and workplace communication. Carl Botan, *Communication Work and Electronic Surveillance: A Model for Predicting Panoptic Effects*, 63 Communications Monographs (1996). In other words, "the more surveilled workers perceive[d] themselves to be" the more they reported negative feelings about these issues. *Id.* at 293. Likewise, a study conducted in Romania in the 1980s found that people feared government surveillance and therefore avoided discussing certain topics, such as those that could be deemed critical of the government. Gabriela Zanfir, 'Big Brother' in a Post-Communist Era, Apr. 20, 2012, at 9-10 (citing Radu Clit, *Frica de zi cu zi* ["The Daily Fear"], *in* Viaţa cotidiană în comunism ["The Daily Life in Communism"] (2004). Similarly, a study of seven urban centers in New Zealand supported the conclusion that a perceived lack of privacy is directly associated with psychosomatic stress.

surveillance directly harms those subject to it—both by forcing them to adjust their behaviors in response to the potential surveillance and by causing related psychological trauma.

Individual stories from people living under the threat of surveillance bear out the results of these studies. Importantly, experience shows that when people reasonably perceive they are likely to be surveilled by the government they alter their behavior to avoid or minimize the surveillance. This reaction flows directly and naturally from the

---

Stephen D. Webb, *Privacy and Psychosomatic Stress: An Empirical Analysis*, 6 Soc. Behavior & Personality 227 (1978). In addition, a study conducted on the impact of loyalty and security procedures on professors and government employees in Washington, DC found that typical reactions to these measures included withdrawing from non-governmental organizations on the Attorney General's list of subversive organizations and cancelling subscriptions to the organizations' literature, refusing to sign petitions without proof of bona fide sponsorship, and being cautious in political conversations with strangers. Marie Jahoda & Stuart W. Cook, *Security Measures and Freedom of Thought*, 61 Yale L.J. 296, 307-08 (1952). *See also* Mary Fulbrook, *Anatomy of a Dictatorship: Inside the GDR 1949-1989* 55 (1995) ("Many East Germans lived with a sense of oppression and fear, although—perhaps even because—they did not know the extent of surveillance and interference in their lives."); Mary Fulbrook, *The People's State: East German Society from Hitler to Honecker* 246 (2005) ("[W]here the vast majority of the populace were aware of the existence of the Stasi [Ministry for State Security], it appears to have been simply taken for granted as a fact of life, in light of which certain precautions had to be taken (which for some individuals undoubtedly meant major restrictions on their activities, whereas for others the impact barely registered).").

threat of surveillance. By way of example, in her memoir about growing up in Budapest, Hungary during the 1950s, Kati Marton describes her parents' fears of government surveillance and the actions they took to avoid it. Endre Marton, Kati's father, often (and correctly) suspected the government was monitoring him due to his work as a reporter for the Associated Press. Later declassified government files document the steps he took to circumvent surveillance. For instance, the government's file details Endre Marton's efforts to prevent government eavesdropping on his telephone conversations, noting that "[d]espite the fact that he has two telephone lines in his apartment, Marton frequently makes calls from public phone booths."[6] Similarly, Endre Marton regularly engaged in a series of maneuvers when driving his car to thwart government watchers. According to the government's file:

> When he first gets in his car, he looks around to make sure no one is following him. Then he usually drives around the corner, makes a loop, before he heads off. Sometimes, he parks in front of the market, on the corner of Csaba and Maros Utca, gets out, looks around before he gets back in his car. When the weather is clear, he keeps the roof of his convertible down, so he is able to observe anybody following him.[7]

---

[6] Kati Marton, *Enemies of the People: My Family's Journey to America* 79 (2009) (quoting Hungarian Secret Police file on Endre Marton).

[7] *Id.*

Endre Marton also suspected (again, correctly) that Gabrielle Guillemet, the governess of his children, was a government spy, and he took numerous precautions accordingly. For example, the government reported that on one evening in early 1955, "the Martons left for the evening but half an hour later Marton returned unexpectedly and looked carefully around the apartment."[8] In addition, the government noted during this period that "[l]ately when [Gabrielle] gets up early in the morning Marton follows her into the kitchen and wants to know what she is doing there."[9]

Kati Marton's mother, Ilona Marton, who was employed as a reporter for the United Press International, took similar measures to avoid government surveillance of her telephone conversations. In particular, Ilona Marton made phone calls from the local post office because "[s]he did not trust [their] house phone."[10] According to a report provided to the government by Gabrielle, Ilona Marton later ripped her house phone "out of the wall."[11] When Gabrielle asked the Marton children why their mother had done so, "the children answered that their mother told them their phone was not only for speaking, but was also for listening into their apartment. The children said that from now

---

[8] *Id.* at 81.

[9] *Id.* at 81-82.

[10] *Id.* at 105.

[11] *Id.* at 115.

on their mother had been told by friends to whisper."[12]

Historical experience shows that it is not only the targets of surveillance who change their behavior. People who believe they may be covered by surveillance affecting a third party will also change their behavior. For example, just as the Martons took reasonable steps to evade surveillance, other members of the Budapest community took steps to stay away from them. Kati recalls that "[m]ost Hungarians feared and avoided my parents."[13] Even as a child, she "understood" that Zsuzsi Kalmar, another local child, "could not reciprocate [a] visit to her home for fear of being contaminated by [the Marton family]."[14] In this atmosphere of distrust, an America diplomat living next door to the Martons even suspected that the Martons themselves were Hungarian spies.[15] To prevent his cook from speaking with them, he installed iron bars on the window of his house facing their apartment.

Others had similar experiences under comparable surveillance regimes. Timothy Garton Ash describes the precautions he took while living in East Berlin in the German Democratic Republic (*i.e.*, East Germany) in 1978 to conduct research in

---

[12] *Id.* After its report on this incident, the government's file dryly concluded, "Notice: telephone listening device no longer functioning at Martons'." *Id.*

[13] *Id.* at 39.

[14] *Id.*

[15] *Id.* at 58.

connection with his history studies at Oxford: "I deliberately did not seek the company of Western correspondents . . . partly because I thought this might arouse the authorities' suspicions."[16] After spending time in East Berlin, Garton Ash became even more cautious of potential surveillance:

> Before flying to Prague, I carefully concealed the names and addresses of the people I was going to visit, writing them, in abbreviated form, in minuscule pencil letters on the back of a Eurocheck. I never telephoned dissident friends, just appeared on the doorstep, after checking that I was not being followed.[17]

Anna Funder further explains the impact that surveillance had on people living in East Germany:

> In [East Germany] it was inconceivable that a person would ask a stranger, a total stranger whether they lived near the border. It was also inconceivable that the stranger would ask you whether you were thinking of escaping. . . . Relations between people were conditioned by the fact that one or the other of you could be one of *them*. Everyone suspected everyone else and the mistrust this bred was the foundation of social existence.[18]

---

[16] Timothy Garton Ash, *The File: A Personal History* 76 (1997).

[17] *Id.* at 209.

[18] Anna Funder, *Stasiland: Stories from Behind the Berlin Wall* 28 (2002). As noted in relevant psychological studies,

Just as the Martons, their neighbors, and Timothy Garton Ash changed their behavior in reasonable response to the threat of surveillance of their lawful activities, respondents acted in reasonable response to the threat of surveillance under the FAA. That action was, in a sense, voluntarily taken, but "[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own injury."[19]

II. THE ECHR HAS HELD THAT PLAINTIFFS POTENTIALLY SUBJECT TO SURVEILLANCE MAY CHALLENGE SUCH SURVEILLANCE

Given Europe's history of invasive state surveillance, the ECHR's analysis permitting applicants, the equivalent of plaintiffs in the U.S. legal system, to challenge government surveillance merits this Court's attention.

---

perceptions of surveillance can be psychologically damaging. *See supra* note 5. For example, a woman whose letters to her boyfriend were routinely intercepted and reviewed by the Stasi was negatively affected by such surveillance, stating, "[L]ooking back on it, it's the total surveillance that damaged me the worst. I *know* how far people will transgress over your boundaries—until you have no private sphere left at all. And I think that is a terrible knowledge to have." Funder, at 113.

[19] *Amnesty Int'l U.S.A.*, 638 F.3d at 133 (quoting 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.5, at 361-62 (3d ed. 2008) (footnotes omitted)).

A. Background on the ECHR and its Surveillance Jurisprudence

Following the devastation of the Second World War, the Council of Europe was founded to promote the rule of law, human rights, and democracy. The Council's first legal treaty to protect human rights was the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").[20] The Convention established the ECHR to rule on individual or State applications alleging violations of the civil and political rights protected under the Convention.[21]

The ECHR is empowered to rule on alleged violations of the Convention concerning States Parties' government surveillance. In particular, applicants to the ECHR may allege violations of Article 8 of the Convention, which provides protections similar to those under the Fourth Amendment to the United States Constitution. Article 8 §§ 1 and 2 of the Convention provide:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of

[20] Convention, Nov. 4, 1950, 213 U.N.T.S. 221.

[21] Convention art. 19. ECHR decisions are binding on countries that have ratified the Convention (the "States Parties"). *Id.* art. 46.

> national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

To find that States Parties' surveillance laws comport with Article 8, the ECHR requires the existence of an "effective control" by which an applicant may challenge a State Party's "interference." The ECHR stated in *Klass v. Germany*:

> [T]he values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 § 2, are not to be exceeded. One of the fundamental principles of a democratic society is the rule of law . . . [which implies] that an interference by the executive authorities with an individual's rights should be subject to an effective control.[22]

The ECHR has described telephone tapping as "a very serious interference with a person's rights and . . . only very serious reasons based on a reasonable suspicion that the person is involved in serious criminal activity should be taken as a basis for authorising it."[23] In addition, in *Lambert v. France*, Judge Pettiti stated that the court's case law on telephone tapping is "undoubtedly one of the most positive aspects of its work to safe-

---

[22] 28 Eur. Ct. H.R. (ser. A) at 25-26 (1978).

[23] *Iordachi*, Eur. Ct. H.R. at 20.

guard fundamental rights."[24] In the *Lambert* case, the ECHR found a violation of Article 8. Judge Pettiti described the interception of telephone conversations as:

> [O]ne of the most serious temptations for State authorities and one of the most harmful for democracies. Originally, reason of State or national security were put forward in the attempt to justify interceptions, particularly in the sphere of so-called administrative telephone tapping that is sometimes used to evade the rules governing judicial telephone tapping. Abuses, however, are becoming more and more unacceptable . . . . In several member States the supervision systems set up to control the monitors have proved inadequate and defective. Will it be necessary in the future, in order to protect privacy, to require people to get into 'bubbles', in imitation of the practice of some embassies, in order to preclude any indiscretions? That would be to give in to Big Brother.[25]

---

[24] 1998-V Eur. Ct. H.R. 2231, 2245 (Pettiti, J., concurring opinion).

[25] *Id.*

B. ECHR Analysis of Admissibility in Surveillance Cases

ECHR cases are admissible if an individual applicant (1) is a victim of a violation of the Convention (or Protocols thereto) by a State Party, and (2) has suffered a significant disadvantage.[26]

In *Iordachi v. Moldova*, a case analogous to the one before the Court, the ECHR considered a case brought by members of Lawyers for Human Rights ("LHR"), a group based in Moldova specializing in representing applicants before the ECHR. Moldovan law provided for wiretapping "'only when such measures are necessary in the interests of national security, public order, the economic situation of the country, the maintenance of legal order and the prevention of serious, very serious and exceptionally serious offences . . . .'"[27] LHR represented many people who could be surveilled under this law and alleged that while not all members of the LHR worked on serious cases, all of its members used LHR telephones and therefore risked interception. The applicants claimed that they ran a serious risk of having their telephones tapped, but did not claim to have been victims of any specific interception of their communications. The Moldovan government responded that no interception of the applicants' communications had taken place, and

---

[26] Convention arts. 34, 35.

[27] *Iordachi*, Eur. Ct. H.R. at 5 (citing Operational Investigative Activities Act of 12 April 1994, § 6(2)(c) (internal emphasis omitted)).

the applicants could not claim to be potential victims because not every person in Moldova was targeted and the legislation clearly established a category of persons susceptible to interception. Nevertheless, the ECHR found an "interference by a public authority" with the applicants' Article 8 rights, stating:

> The mere existence of the legislation entails, for all those who might fall within its reach, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunication services and thereby constitutes an 'interference by a public authority' with the exercise of the applicants' right to respect for correspondence . . . .[28]

In reaching this result, the ECHR cited its decision in *Klass*:

> The Court points out that where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8, or even to be deprived of the right granted by that Article, without his being aware of it and therefore without being able to obtain a

---

[28] *Id.* at 15-16.

> remedy either at the national level or before the Convention institutions.
>
> . . .
>
> The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25 [concerning the powers of the ECHR], since otherwise Article 8 runs the risk of being nullified.[29]

Here, petitioners seek to bar respondents' claims based on a similar lack of knowledge of "how the government exercises its targeting authority under Section 1881a."[30] In other words, petitioners contend that the government can eliminate respondents' ability to challenge violations to their constitutional rights "by the simple fact [that respondents are] kept unaware of [the] violation."[31] The ECHR rejected this very theory, concluding in *Iordachi* that the LHR applicants' claims were admissible because they had extensive contact with individuals that Moldovan authorities were authorized to wiretap.

---

[29] *Id.* at 15.

[30] Pet. Brief at 31.

[31] *Compare Iordachi*, Eur. Ct. H.R. (Sept. 14, 2009) at 15, *with* Pet. Brief at 31.

Moreover, the ECHR reasoned that secret surveillance measures could have been applied to the applicants and they were "at the material time potentially at risk of being subjected to such measures."[32] The same reasoning applies to respondents here.[33]

Similarly, in *Lambert v. France*, the ECHR ruled on the case of an applicant who had been convicted based on evidence collected using a wiretap of a

---

[32] *Iordachi*, Eur. Ct. H.R. at 15.

[33] This result is consistent with this Court's standing decisions. *See Davis v. FEC*, 554 U.S. 724, 734-35 (2008) (congressional candidate had standing to challenge campaign finance law that allowed competitors to receive additional contributions in certain circumstances, even though the relevant provision was not yet triggered when suit was filed, because "the record at summary judgment indicated that most candidates who had the opportunity to receive expanded contributions had done so"); *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (plaintiffs had standing to bring facial challenge to rent control law because "[t]he likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury to satisfy Art. III's requirement that a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement" (internal quotation marks and bracket omitted)); *Duke Power Co.*, 438 U.S. at 73-78 (plaintiffs had standing to bring constitutional challenge against statute capping liability for nuclear reactor accidents, because statute incentivized defendant to build and operate nuclear facility whose "emission of . . . radiation into [plaintiffs'] environment would also seem a direct and present injury").

third party's telephone line when the applicant happened to use the tapped telephone. The applicant alleged interference by a public authority under Convention Art. 8 § 2.[34] The French Court of Cassation had rejected the application on the basis that the applicant had no "locus standi" to challenge the monitoring of a third party's telephone line.[35] The ECHR disagreed and found it "of little importance that the telephone tapping in question was carried out on the line of a third party" because telephone conversations are covered by notions of "private life" and "correspondence" within the meaning of Article 8, and the interception amounted to "interference by a public authority."[36]

Despite holding in *Lambert* that the French telephone tapping law satisfied Convention Article 8 requirements, the ECHR found a violation of Article 8 of the Convention, stating:

> [The French] Court of Cassation's reasoning could lead to decisions whereby a very large number of people are deprived of the protection of the law, namely all those who have conversations on a telephone line other than their own. That would in practice render the protective machinery largely devoid of substance. That was the case with the applicant,

---

[34] *Lambert*, 1998-V Eur. Ct. H.R. at 2238.

[35] *Id.* at 2236.

[36] *Id.* at 2238-39. Again, this decision is consistent with U.S. case law on standing. *See Duke Power Co.*, 438 U.S. at 73-78.

> who did not enjoy the effective protection of national law, which does not make any distinction according to whose line is being tapped . . . . The Court therefore considers . . . that the applicant did not have available to him the 'effective control' to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was 'necessary in a democratic society.'[37]

That warning is particularly apt here.

---

[37] *Lambert*, 1998-V Eur. Ct. H.R. at 2241-42.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated: New York, New York
September 21, 2012

Respectfully submitted,

Carmine D. Boccuzzi
(*Counsel of Record*)
Michael R. Lazerwitz
Frances Mejia
Liana R. Vitale
Christopher P. DeNicola
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
cboccuzzi@cgsh.com

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1025

In the Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS

v.

AMNESTY INTERNATIONAL USA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE THE CENTER FOR CONSTITUTIONAL RIGHTS AND ATTORNEYS INVOLVED IN NATIONAL SECURITY LITIGATION, SUPPORTING RESPONDENTS

SHAYANA KADIDAL
Counsel of Record
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
kadidal@ccrjustice.org
(646) 498-8498

TABLE OF CONTENTS

Interest of Amici Curiae 1

Summary of Argument 1

Argument 2

Tina Foster 5

Ramzi Kassem 9

Candace Gorman 13

Thomas H. Nelson 16

The Center for Constitutional Rights 19

Injuries such as those suffered by plaintiffs and amici are legally sufficient to underlie standing 28

Conclusion 31

Appendix: List of Amici Curiae a-1

TABLE OF AUTHORITIES

CASES

ACLU v. NSA,
493 F.3d 644 (6th Cir. 2007) 27

Amnesty Int'l USA v. Clapper,
638 F.3d 118 (2d Cir. 2011) 21-22

Amnesty Int'l USA v. Clapper,
667 F.3d 163 (2d Cir. 2011)
(opinions respecting denial of
reconsideration *en banc*) 2-3

Al-Haramain Islamic Found., Inc. v. Bush,
507 F.3d 1190 (9th Cir. 2007) 16, 24

Al-Haramain Islamic Found., Inc. v. Bush,
2012 U.S. App. LEXIS 16379
(9th Cir. Aug. 7, 2012). 17

Berger v. New York,
388 U.S. 41 (1967) 4, 22

Boumediene v. Bush,
553 U.S. 723 (2008) 13

Center for Constitutional Rights v. Bush,
No. 07-1115 (N.D. Cal) 27

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 29

Jones v. R.R. Donnelley & Sons Co.,
541 U.S. 369 (2004) 13

Katz v. United States,
389 U.S. 347 (1967) 4

Kilgore v. Mitchell,
623 F.2d 631 (9th Cir. 1980) 23

Laird v. Tatum,
408 U.S. 1 (1972) 28-29

Lehnert v. Ferris Faculty Ass'n,
500 U.S. 507 (1991) 5

Meese v. Keene,
481 U.S. 465 (1987) 28

NAACP v. Button,
371 U.S. 417 (1963) 5

Tatum v. Laird,
444 F.2d 947 (D.C. Cir. 1971) 29

United Presbyterian Church v. Reagan,
557 F. Supp. 61 (D.D.C. 1982) 30

United Presbyterian Church v. Reagan,
738 F.2d 1375 (D.C. Cir. 1984) 29-30

United States v. Chavez,
533 F.2d 491 (9th Cir. 1976) 22

United States v. Daly,
535 F.2d 434 (8th Cir. 1976) 22

United States v. Rizzo,
491 F.2d 215 (2d Cir. 1974) 23

United States v. Scott,
436 U.S. 128 (1978) 22

United States v. Tomero,
462 F. Supp. 2d 565 (S.D.N.Y. 2006) 11

United States v. Turner,
528 F.2d 143 (9th Cir. 1975) 22-23

STATUTES

50 U.S.C. § 1801(f)(2) 26

BRIEFS AND PLEADINGS

Brief for Petitioners 26

Brief for Respondents 25-27

Defs. Reply Br., Dkt. 49, *CCR v. Bush*,
No. 07-1115 (N.D. Cal.) 24

Supplemental Brief of the United States,
Appendix A: Comparison of FISA and Title III,
In re Sealed Case, No. 02-001
(FIS Ct. of Review filed Sep. 25, 2002) 22

Affirmation of Stephen Gillers, Dkt. 16-6,
CCR v. Bush, No. 07-1115 (N.D. Cal.) 20, 23-25

Complaint, *United Presbyterian Church v. Reagan*,
Civil Action No. 82-1824 (D.D.C. Jun. 30, 1982) 30

OTHER AUTHORITIES

JAMES BAMFORD, BODY OF SECRETS (2008) 27

James Bamford, Inside the Matrix: The NSA Is Building the Country's Biggest Spy Center, Wired (Mar. 15, 2012), *available at* http://www.wired.com/threatlevel/2012/03/ff_nsadatacenter/all/(2008) 23, 27

Jon B. Eisenberg, Suing George W. Bush: A bizarre and troubling tale, Salon.com (Jul. 9, 2008) 17

Press Briefing by Attorney General Alberto Gonzales and General Michael V. Hayden (Dec. 19, 2005), *available at* http://www.fas.org/irp/news/2005/12/ag121905.html (last visited Sep. 22, 2012) 27

Patrick Radden Keefe, State Secrets: A Government Misstep in a Wiretapping Case, The New Yorker (Apr. 28, 2008). 17

Assistant Attorney General William E. Moschella, Responses to Joint Questions from House Judiciary Committee Minority Members (Mar. 24, 2006), *available at* http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf (last visited Sep. 20, 2012) 24

James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times (Dec. 15, 2005) 13, 17-19, 21

JAMES RISEN, STATE OF WAR (2006) 27

Philip Shenon,
Lawyers Fear Monitoring in Cases on Terrorism,
N.Y. Times (Apr. 28, 2008) 24

INTEREST OF AMICI CURIAE[1]

Amici are four individual attorneys and a non-profit law firm[2] actively engaged in litigation representing foreign nationals located abroad in cases implicating national security and/or allegations of terrorist activity. As a result, like the plaintiffs in this case, they too have reasonable fears that their privileged communications are at risk of interception under surveillance authorized by the FISA Amendments Act of 2008 ("FAA"), and have been forced to take costly and burdensome countermeasures to minimize that risk.

SUMMARY OF ARGUMENT

While the government failed to challenge the factual averments of injury by plaintiffs below, it now attempts to do so on appeal, and several Second Circuit judges cast doubt on them in dissenting from denial of *en banc* review. Amici therefore make this primarily empirical submission to demonstrate that plaintiffs' fears are both widespread among the small group of lawyers engaged in litigation against the government in national security cases, and reasonable. So, too, are the countermeasures plaintiffs have adopted to protect against the risk of surveillance—indeed, for attorneys they are mandatory. The need to protect against the potential harm from surveillance under the FAA is particularly great given the

---

[1] Counsel for amici affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties have consented to the filing of this brief. The parties' consent letters have been filed with the Clerk's office.

[2] A list and additional biographical/historical information are in the Appendix.

absence of any judicially-supervised minimization that might otherwise protect plaintiffs' legally privileged communications. That is sufficient to satisfy the existing law of standing, which demands only that avoidance injuries be a consequence of objectively reasonable fears of concrete, objective harm—dual requirements which in tandem will more than adequately protect against judicial overreach in chilling-effect cases.

ARGUMENT

In his opinion dissenting from the Second Circuit's denial of *en banc* review of the panel opinion below, Judge Jacobs stated that "the plaintiffs suffered no injury," *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 203 (2d Cir. 2011), complaining that the "panel's analysis ... simply credits as sufficient certain averments by the plaintiffs that seem to me inadequate, implausible, and illusory," *id.* at 200. As he neatly characterized the asserted injuries:

> Their claim is that the FAA lowers the standards for obtaining warrants to surveil foreign persons abroad, which has caused the plaintiffs, who are not foreigners, to develop a reasonable fear of being surveilled when communicating with foreigners around the world who are their journalistic sources, clients, human rights victims, witnesses and so on—all of whom are, in plaintiffs' estimation, potential objects of surveillance. The plaintiffs contend that this fear compels them to communicate with their clients or foreign contacts only in person, at such trouble and expense as to constitute injury that supports standing.

Id. at 201. He further stated that in support of the "otherwise-mysterious" assertions of injury-in-fact and causation, "the panel opinion relies entirely (even credulously) on affidavits submitted by the plaintiffs, describing their supposed anxieties." *Id.* at 201. After complaining that only some of the declarants were attorneys active in litigation, *id.*, that they merely anticipated measures to avoid surveillance that would be adopted in "the conveniently unknown future,"[3] *id.* at 202, and that the asserted countermeasures were merely "what every good lawyer does—on every matter," *id.*, he concluded:

> At the risk of being obvious, the purpose of this lawsuit is litigation for its own sake—for these lawyers to claim a role in policy-making for which they were not appointed or elected, for which they are not fitted by experience, and for which they are not accountable. As best I can see, the only purpose of this litigation is for counsel and plaintiffs to act out their fantasy of persecution, to validate their pretensions to policy expertise, to make themselves consequential rather than marginal, and to raise funds for self-sustaining litigation. In short, counsel's and plaintiffs' only perceptible interest is to carve out for themselves an influence over government policy—an interest that the law of standing forecloses.

Id. at 203. Amici submit this brief first and foremost to show that, as an empirical matter, this tendentious account is willfully blind to the practical consequences of the FAA for attorneys litigating national security cases

---

[3] The present lawsuit was filed on the day the challenged statute was signed into law.

against the government. The concerns voiced by the handful of plaintiff declarants are in fact broadly shared among the limited set of attorneys working on terrorism cases.

It goes without saying that the primary reason this is so is the vital role maintaining confidentiality plays to the work of attorneys—to protect both the secrecy of strategic discussions, and the very idea of confidence so vital to building and maintaining client trust. Both are values shared by the journalist plaintiffs in this case. But the attorney plaintiffs, and the attorney amici whose practices are described in this brief, also have an obligation to protect the legal privilege of their communications with clients and others with whom they develop work product (witnesses, experts, foreign co-counsel, and so forth). For attorneys, that obligation is mandatory as a matter of legal ethics and professional responsibility.

The law of surveillance recognizes this unique interest by mandating that, even when surveillance is authorized pursuant to a warrant, the confidentiality of legally privileged communications must be protected by the implementation of minimization procedures, compliance with which will be supervised on an ongoing basis by the judicial authority issuing the warrant. Following the suggestion of this Court in *Berger v. New York* that the uniquely broad intrusion occasioned by tapping a phone line required heightened safeguards for any extension of the warrant process to such electronic surveillance,[4] the

---

[4] *Berger v. New York*, 388 U.S. 41, 56-60, 63-64 (1967) ("The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope."). *Berger* was decided six months before *Katz v. United States*, 389 U.S. 347 (1967) extended the warrant requirement to wiretaps.

courts have always viewed minimization to protect privileged conversations as a constitutional requirement. While in the past the overwhelming majority of statutorily-authorized surveillance by our government would have been subject to judicially-supervised minimization procedures, after the FAA that is no longer the case.

* * *

As set forth below, the individual amici are all attorneys engaged in litigation representing foreign nationals located abroad in cases implicating national security and/or allegations of terrorist activity. Like the plaintiffs, the passage of the FAA has caused them to implement countermeasures to surveillance that have imposed expense and unwanted burdens on their practice of law—which consists primarily in suing the very adversary that the FAA allows to intrude on their privileged communications. The statute has also rendered various third parties vital to their litigation practices less willing to communicate with them. All of this harms their legally-protected interest in engaging in public-interest litigation, the "political and expressive nature" of which this Court has "long ... recognized." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) (citing *NAACP v. Button*, 371 U.S. 415, 429 (1963)).

Tina Foster

Tina Monshipour Foster is a New York-based human and civil rights attorney. She is the founder and Executive Director of the International Justice Network ("IJN"), a not-for-profit organization which helps victims of human rights abuses and their communities access legal assistance through a global network of leading human rights attorneys, academics, advocates, NGOs, and grassroots organizations. The majority of her clients are indigent Arab and Muslims who she represents on a *pro*

bono basis. A large number of these individuals are current or former prisoners held without charge in United States custody overseas, at Guantánamo Bay, Cuba or Bagram Airfield in Afghanistan.

Ms. Foster's organization, IJN, does not have a physical office. Instead, IJN attorneys and staff utilize internet technology to collaborate with one another in a "virtual office," which is a secure password-protected site hosted on its website at www.ijnetwork.org. Ms. Foster and her colleagues rely on email, live chat, mobile telephones and blackberries to communicate with each other as well as with clients, co-counsel, investigators, journalists, experts, and witnesses or others who may assist with their work in dozens of countries around the world.

As part of her legal representation of current or former Bagram and Guantánamo detainees, Ms. Foster is frequently in touch with individuals and legal or human rights organizations in Afghanistan, Yemen, Pakistan, Turkey, Kuwait, Qatar, Bahrain, and the U.A.E., including the family members of individuals who are believed to be detained by the United States military at known and secret prisons run by the U.S. military. She also routinely needs to be in contact with colleagues in several other countries in Europe, Asia and Africa, as well as witnesses, experts, and cooperating counsel abroad. Absent the threat of surveillance, her preferred means of communication with these widely-strewn parties would be telephone, email, live chat, Google Talk, Skype, and other online collaboration tools, and she uses one or more of these media for certain confidential communications almost every day. However, for obvious reasons, monitoring of her communications would be particularly destructive for her legal work. It might also result in the intentional or unintentional monitoring of the communications of her colleagues or others.

Many clients, witnesses, lawyers and advocates with whom Ms. Foster works on the Guantánamo, Bagram and other cases face very real threats from repressive governments or criminal groups in their own countries. In addition to cultural differences, the fact that she is an American citizen also makes it a challenge to establish a rapport with individuals who have suffered greatly as a result of actions taken by our government. In light of the natural mistrust that potential clients and witnesses must overcome in order to collaborate with U.S. lawyers on these cases, it is even more important that these individuals feel that the information they provide be held in strictest confidence. Indeed, confidentiality is essential in order to ensure not only that witnesses and other key individuals are willing to cooperate, but it is also required in order to ensure the safety of all parties, including the clients' families, lawyers, advocates, and others who courageously come forward to expose human rights abuses and other illegal conduct.

Ms. Foster has often had to counsel such individuals of the possibility that their conversations could be surveilled by the U.S. government. As a result, they are reluctant to provide her private information, and sometimes refuse to be contacted directly at all, via telephone or internet. Consequently, she has had to spend a great deal of time and money in order to have in-person meetings with clients, witnesses, experts, investigators, and others because of concerns about the confidentiality of their electronic communications. In addition, she also has had to travel to areas in which there is ongoing political instability or armed conflict in order to have these meetings—often times at the risk of her own safety.

The availability of low cost internet technology and mobile telephones globally has made it possible for victims of human rights abuses and their advocates in remote areas to access information and assistance from

abroad. Ironically, in less-developed areas of the world, what we view as high-tech electronic means of communications are in fact often the *only* available means of communicating over distances: Older methods of communications, such as government postal systems, private mail carriers, and traditional telephone land-lines are still not available to many of Ms. Foster's clients, either because they live in areas where such services do not exist, or because such services are prohibitively expensive. In short, absent the use of internet-based electronic means of communication, it is often not possible for Ms. Foster to speak with her many clients in Afghanistan and Yemen at all without scheduling a face-to-face meeting.

In order to protect privileged attorney-client communications and other confidential information, Ms. Foster has had to physically travel as far as Afghanistan, Pakistan, Yemen, the United Arab Emirates, Bahrain, Germany, France, and the United Kingdom for the sole purpose of having in person meetings with key witnesses, client representatives, experts, investigators, and co-counsel. Many of these individuals are not in any way suspected of links to terrorism or "foreign powers" under FISA's original definition. Instead, they are witnesses and victims, political dissidents and local activists, local experts (including staff of human rights organizations) and local journalists. Yet the vast scope of the FAA makes them all vulnerable to surveillance.

As a consequence, she now spends, on average, about one-third of her working hours traveling away from home, solely to be able to communicate with relevant litigation participants at in-person meetings. In addition to the amount of time spent away from her home and family, this travel takes a toll on already scarce IJN financial and administrative resources. Such costs, which would not have been necessary had it not been for the

threat of U.S. government surveillance, severely limit the number of clients and matters in which Ms. Foster can provide assistance, and she has had to turn away many potential clients desperately in need of legal assistance to address gross violations of their fundamental human rights.

The most recent of these trips is taking place as this brief is being submitted: a trip to Pakistan and Afghanistan to meet with clients so that privileged communications that can only go forward in person can take place. During these trips she frequently travels back and forth to various locations to deliver USB drives to clients, witnesses and attorneys with whom she works on national security cases because they do not want to discuss matters on email or by telephone. Ms. Foster also recently purchased a secondary laptop computer because of the fear of connecting her primary laptop, on which she keeps sensitive files stored, to the internet and thereby exposing it to the potential for compromise through government spyware. Between her travel and technological countermeasures, Ms. Foster has spent tens of thousands of dollars on avoiding surveillance just to be able to do work in this field.

In sum, the threat of government surveillance has cost Ms. Foster and her clients an enormous amount of concern, time, and expense. It has also severely limited her ability to effectively represent her clients and IJN's constituency because it is impossible to arrange in-person meetings as often as needed to protect privileged and confidential information.

Ramzi Kassem

Ramzi Kassem is Associate Professor of Law at the City University of New York School of Law. Before joining the CUNY faculty in 2009, he held teaching positions

at Yale and Fordham Law Schools. He directs the Immigrant & Non-Citizen Rights Clinic. Through that program, with his students, Professor Kassem represents prisoners of various nationalities presently or formerly held at American facilities at Guantánamo Bay, Cuba, at Bagram Air Base, Afghanistan, at so-called "Black Sites," and at other detention sites worldwide.

Professor Kassem and his law students represent a number of individual clients and parties in extraterritorial cases and domestically. Many of his clients stand accused of either engaging in terrorism or supporting groups deemed by the United States government to be terrorist organizations, or are thought by the government to have associations with members of such organizations. Some are already charged or face likely indictment, either in Article III courts or before military commissions. Many are detainees held at Guantánamo and Bagram. In representing these clients, he must communicate with potential witnesses in their cases as well as family members, human rights investigators and advocates overseas, and other lawyers and co-counsel abroad.

The surveillance authorities contained in the FAA have greatly increased Professor Kassem's reluctance to engage in such communications over cell phones, land lines, and email—all mediums which would otherwise be the most convenient and conducive to his work as an advocate. In order to avoid the prospect of confidential and privileged communications being compromised by surveillance under the FAA, he, his clients, and witnesses often travel to meet each other in person to share information rather than using electronic means of communication. Since the passage of the FAA in 2008, he has traveled long distances to meet clients and other litigation participants (witnesses, investigators, family mem-

bers, and fellow counsel) in cases having an international dimension.

The assumption that all electronic means of communication are subject to surveillance has become so pervasive that individuals will often pull batteries out of cell phones before these in person meetings with Professor Kassem—even people not charged with any crime—on the assumption that law enforcement is capable of remotely and surreptitiously turning on the microphones on such devices and transmitting the resulting signal so long as the devices are connected to their power source.[5]

Even means of communication that were previously trusted for international communication—such as Skype, which uses a 256 bit symmetric-key Advanced Encryption Standard—are no longer viewed as safe by the individuals Professor Kassem generally communicates with overseas. In general, standard electronic communication mechanisms have since 2008 not been very beneficial to his litigation and advocacy efforts.

The need to travel overseas in order to meet with clients and other litigation participants located abroad creates another set of concerns. In addition to being guarded about his use of electronic communications, Professor Kassem retains information technology consultants who advise him on data protections technologies such as encryption for his computers and other storage devices. Because he must travel to meet individuals he needs to speak to regarding his cases, he sometimes needs to carry sensitive data with him—both information relevant to the cases they are involved with, and also information relevant to other cases for which Professor Kassem has ongoing responsibilities that may require

---

[5] *See United States v. Tomero*, 462 F. Supp. 2d 565, 567 (S.D.N.Y. 2006) (describing such capacity used in mafia investigation).

attention while he is traveling abroad. Ironically, his ethical obligations to clients in these other cases sometimes require him to travel with sensitive, privileged information in his possession, but also require him to take whatever reasonable steps he can to protect their confidentiality. Doing so imposes both a great burden in terms of time and attention, and also some degree of expense.

Many times conversations necessary to litigation and advocacy efforts have been postponed because of the fear of electronic surveillance if the phone or email were used. Oftentimes this discomfort is mutual—the individuals abroad are uncomfortable communicating with Professor Kassem because of the fear of electronic surveillance of those communications by the United States government. Often as a result, conversations with such individuals are either postponed or never held.

Professor Kassem was well-versed in the state of surveillance authorities prior to the passage of the FAA. While both he and the individuals he communicated with routinely in his work bore a certain degree of concern about government surveillance, those concerns were somewhat tempered in degree by the fact that nearly all surveillance of international communications had to take place under judicial supervision,[6] including, for pre-2008 FISA surveillance, a requirement that a judge find probable cause that an individual targeted for such surveillance be an agent of a foreign power. That element of individualized suspicion, as confirmed by a showing to a judge, is no longer present with the new statutory authorities. Moreover, and of special importance to attorneys like Professor Kassem, surveillance under the old

---

[6] This excludes, of course, surveillance under the extralegal NSA Program and the short-lived Protect America Act of 2007.

FISA was subject to minimization procedures that were also supervised by judges on a continuing basis.

Candace Gorman

H. Candace Gorman is the principal in her own law firm, located in Chicago, Illinois. She comes from a family of attorneys and has herself been an attorney for thirty years. Her firm deals mostly with civil rights and human rights cases. She argued and won a unanimous decision before this Court in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) (applying four-year federal statute of limitations to Section 1981 cases).

She has also represented two detainees at Guantánamo in habeas corpus proceedings, Abdul Hamid Al-Ghizzawi and Abdal Razak Ali. The Declaration of Stephen Abraham, received by this Court between the initial denial of certiorari in *Boumediene* in April of 2008 and the reversal of that decision on reconsideration later that summer,[7] described her client Al Ghizzawi's initial CSRT victory, which was followed by a second CSRT proceeding held in order to reverse the initial decision.

From the moment the *New York Times* disclosed the existence of the Bush administration's NSA warrantless surveillance program in December 2005 ("NSA Program"),[8] Ms. Gorman has been concerned that her privileged communications with her clients and others she must speak to in the course of her practice (including family members of clients, witnesses or potential witnesses, foreign government officials, foreign attorneys, non-governmental organizations, translators and inves-

---

[7] *Boumediene v. Bush*, 549 U.S. 1328 (Apr. 2, 2007) (denying cert.), *vacated on reh'g*, 551 U.S. 1060 (Jun. 29, 2007) (granting cert.).

[8] James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times (Dec. 15, 2005).

tigators, media outlets, and others) fit the descriptions of communications subject to targeting under the NSA Program and thus would be subject to surveillance without judicial supervision. Those concerns continue today with the codification in the 2008 FAA of authorities effectively permitting the government to conduct another NSA Program with only the most minimal of judicial oversight.

Like the other amici described herein, Ms. Gorman struggled with finding a way to conduct communications while respecting her ethical obligations to protect client confidences and legal privilege. She found meeting face-to-face to be very time consuming and prohibitively expensive to be used for all communications. Mail was also too slow and does not easily allow more than two people to participate. Although she did on occasion use postal mail and courier services, those did not offer sure protection from intrusion, but only a greater likelihood of discovering that confidence had been breached. Moreover, most putative substitutes for the telephone and email were unsatisfactory because they could not allow for the two way dialogue—the give-and-take between lawyer and client, witness and interviewer—that is so essential to thorough factual development, allowing the lawyer to elicit extra details, or probe an account for weaknesses. Moreover, in human rights cases stretching across geographic and cultural borders, the lack of give-and-take makes it difficult to build trust with the person being spoken to—and whatever trust is built up will be destroyed and never regained if the confidentiality of the communications is broken.

Ms. Gorman eventually stopped taking on new cases because she felt she could no longer ensure that communications with her clients and others were confidential because her work on the two Guantánamo detainee cases described above meant all her communications were like-

ly to be intercepted. For the same reason she felt she was putting the communications of other attorneys who practiced in the same physical location as her at risk. Although the government announced that the NSA Program was terminated in January 2007—to be replaced by a short-lived continuation of the program in all but name under a series of orders from a single FISA judge, and then later by the 2007 Protect America Act—Ms. Gorman arranged to wrap up the remainder of her practice outside the Guantánamo cases, first declining to renew her lease on her office, and then arranging to leave the United States for almost two full years, taking up an appointment as a Visiting Professional at the International Criminal Court at the Hague in January 2008.

Even through 2009, and to the present day, she has not recovered the level of comfort with representing clients—particularly foreign clients—in U.S. courts that she had prior to the December 2005 disclosure and official acknowledgment of the NSA warrantless surveillance program and its effective codification in the 2008 FAA. Ms. Gorman did not take any new U.S. cases until 2010. Since her return to the United States, Ms. Gorman has taken on only two new cases—both involving clients local to the Chicago area where she lives and practices.

One of Ms. Gorman's Guantánamo detainee clients, Mr. Al-Ghizzawi, a Libyan national who had been detained in Afghanistan where he was living as a refugee from the Qaddafi regime, was released and resettled in the Republic of Georgia in March 2010. She visited him in person after his resettlement, in part because she assumed their electronic communications would be monitored; the FBI came to visit Al-Ghizzawi after his resettlement, confirming our government's continued interest in him as a source of information.

Ultimately, the existence of the surveillance authorities contained in the FAA has irremediably eroded Ms.

Gorman's confidence that she can communicate with clients in a confidential manner, and that they can trust that what they say will go no farther than their personal exchange. As she has put it, "I no longer have that trust; I no longer even have the ability to earn that trust."

Thomas H. Nelson

Thomas H. Nelson is an attorney based in Welches, Oregon. In March 2004 he represented a local attorney and Muslim, Brandon Mayfield, who was falsely accused of participation in the Madrid train bombing of that year. As a result of the national attention given to that case, Mr. Nelson was contacted by attorneys for the Al-Haramain Islamic Foundation of Ashland, Oregon and asked to represent the charity in a number of matters stemming from the freezing of its assets in Oregon by the Department of the Treasury. Since that time he has been the primary attorney for the Oregon charity and the main liaison both to its personnel in Riyadh, Saudi Arabia and its attorneys in the United States.

In that role Mr. Nelson initiated litigation on behalf of the charity in a case seeking damages for unlawful surveillance of the communications of officials of the charity with its attorneys. As the Ninth Circuit characterized the facts, Al-Haramain was designated as a "Specially Designated Global Terrorist" "due to the organization's alleged ties to Al Qaeda. ... [D]uring Al-Haramain's civil designation proceeding," Treasury officials inadvertently turned over to the organization's counsel a document labeled "top secret." "[A]fter *The New York Times*' story broke in December 2005, [Al-Haramain] realized that the ... [d]ocument was proof that it had been subjected to warrantless surveillance in March and April of 2004." *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1194-95 (9th Cir. 2007).

More specifically, published accounts state that this document provided evidence that the NSA had intercepted communications between an official of Al-Haramain and the charity's American lawyers, Wendell Belew and Asim Ghafoor,[9] whose practices are located in the Washington D.C. area—the sort of surveillance retention of which would surely never be approved of by a federal judge supervising a wiretapping order under the original FISA statute or Title III (absent an active role in some criminal conspiracy by the attorneys on the line).

After years of litigation, the Ninth Circuit found the document protected by the state secrets privilege notwithstanding its accidental disclosure, and thus unavailable to the Plaintiffs. After further proceedings, the lower court nonetheless found that plaintiffs had established a prima facie case of unlawful surveillance based on circumstantial evidence effectively uncontested by the government, and awarded damages and attorneys' fees, but that ruling was overturned on sovereign immunity grounds by the Ninth Circuit. *Al-Haramain*, 2012 U.S. App. LEXIS 16379 (9th Cir. Aug. 7, 2012).

Once the *New York Times* story was published and Mr. Nelson drew the connection between it and surveillance of counsel for Al-Haramain, he sought ethical advice from Mark Fucile, an Oregon attorney whose practice focuses on ethical and professional responsibility issues that arise in the legal profession, and who has regularly published articles in the journals of the Oregon, Washington, and Idaho bar associations on the rules of professional responsibility in those states. Mr. Nelson retained Mr. Fucile to advise him on the obligations an attorney who has a reasonable suspicion that his com-

---

[9] *See* Patrick Radden Keefe, State Secrets: A Government Misstep in a Wiretapping Case, The New Yorker (Apr. 28, 2008); Jon B. Eisenberg, Suing George W. Bush: A bizarre and troubling tale, Salon.com (Jul. 9, 2008).

munications with and/or affecting his client are being intercepted bears to protect his communications from interception, and what steps the attorney should take to protect the client's confidences in such a situation. The advice he received was categorical: such communications could not take place by electronic means if the lawyer has a reasonable suspicion that his electronic communications are being monitored.

Nearly all of Mr. Nelson's caseload today involves national security cases, with clients under either criminal or Department of Commerce investigation. Following the formal counsel he has received from Mr. Fucile, Mr. Nelson believes that his ethical responsibilities mandate that anytime he has a real suspicion that the government may be surveilling his communications with his clients—even on non-criminal commercial matters—he has an obligation not to use electronic means of communication for privileged conversations. Moreover, that obligation to avoid electronic communications is not a conditional one—it is categorical.[10]

As a result, Mr. Nelson has made more than fifty trips overseas to meet clients face to face, in countries including Saudi Arabia, Iran, Sweden, and Algeria, since the December 2005 *New York Times* story was published. Every time Mr. Nelson needs to have a confidential communication with his clients in these countries, he gets on an airplane and visits them in person to do so. Frequently he spends a day traveling each way for as little as four hours of time advising the client, as will likely be the case during a trip he is taking as this brief is being filed: A client of Mr. Nelson's in Saudi Arabia needs to have a full and frank strategic discussion re-

---

[10] Mr. Nelson does not trust that available encryption systems for communications are sufficient to protect the confidentiality of his communications from the surveillance capacities of the U.S. government.

garding his case that could easily take place over the phone but for the threat of electronic surveillance by our government outside of judicial supervision and minimization. Even so, further safeguards are often necessary—for instance, the documented risk of surreptitious, remote activation of cell phone microphones[11] means he and his clients often remove the batteries from their mobile devices when meeting in person.

Many of Mr. Nelson's clients are unable to travel to the United States, including most of his Iranian clients. It is also difficult and burdensome for Mr. Nelson to travel to meet them. He is currently struggling to obtain a visa to visit Iran, having held several meetings with Iranian clients in a free trade zone on the Iranian resort Island of Kish, which is more accessible to foreigners (who can generally receive 14 day visas to enter the zone at the airport). His Swedish client cannot visit him because that client is on the international no-transport list (the "no-fly" list). Similarly, Mr. Nelson represented two U.S. citizens stranded in Tunisia because they were not permitted to board airplanes (unless they submitted to interviews with the FBI, *sans* counsel); he was therefore forced to visit them in Tunisia in order to have privileged conversations with them.

The Center for Constitutional Rights

CCR is a nonprofit public-interest law firm that has since 9/11 been extensively engaged in litigation challenging detention, interrogation and rendition practices of the federal government. When the *New York Times* broke the story of the original NSA warrantless surveillance program in December of 2005, CCR's legal staff perceived that many of their international communica-

---

[11] *See supra* note 5.

tions in the course of their litigation and related work had been, and would be, subject to government surveillance entirely outside of judicial supervision. As a result CCR's management consulted with a number of ethics experts, and sought and received formal ethical advice from NYU Law School Professor Stephen Gillers. That advice stated: "The decision [to avoid using electronic means of communications for client secrets or confidences in light of the existence of the NSA Program] is not discretionary. It is obligatory."[12]

The threat posed by this surveillance forced CCR staffers to change their international communications practices—preventing some communications entirely, delaying others, and sometimes requiring costly international travel to replace calls and emails. It imposed costly burdens to investigate and take stock of potential past breaches of confidences. It also dissuaded third parties from communicating with and working with CCR because of the fear that their communications with us might be intercepted under the Program—reactions that were entirely independent of our voluntary actions. All of this was documented in sworn, uncontested declarations in the litigation CCR commenced to try to enjoin that program.[13] Moreover, the threat that the government has stored records from that surveillance continues to this day.

Like the plaintiffs and all of the amici described above, CCR and its staffers continue to be injured in the same ways from the threat of similarly broad surveillance under the FAA. If anything, the FAA allows for broader surveillance than the patently illegal surveillance acknowledged by the government in the wake of

---

[12] Affirmation of Stephen Gillers, Dkt. 16-6, *CCR v. Bush*, No. 07-1115 (N.D. Cal.), ¶ 9.

[13] *See* Dkt. Nos. 16-4, 16-7, 16-8, 16-9, *CCR v. Bush*, No. 07-1115 (N.D. Cal.).

the *New York Times* story. Like the Congressionally-unauthorized NSA program, the FAA provides for only the thinnest veneer of judicial supervision. As the Second Circuit panel characterized it:

> Prior to the FAA, surveillance orders could only authorize the government to monitor specific individuals or facilities. Under the FAA, by contrast, the plaintiffs allege that an acquisition order could seek, for example, "[a]ll telephone and e-mail communications to and from countries of foreign policy interest—for example, Russia, Venezuela, or Israel—including communications made to and from U.S. citizens and residents." Moreover, the specific showing of probable cause previously required, and the requirement of judicial review of that showing, have been eliminated. The government has not directly challenged this characterization.

Amnesty Int'l USA v. Clapper, 638 F.3d 118, 126 (2d Cir. 2011). This is especially significant for CCR because, for most of our clients, the government has conspicuously failed to produce any evidence substantiating links between them and terrorism or other criminal activity. Moreover,

> [t]he preexisting FISA scheme allowed ongoing judicial review by the [Foreign Intelligence Surveillance Court.] But under the FAA, the judiciary may not monitor compliance on an ongoing basis[. Instead,] the FISC may review the minimization procedures only prospectively, when the government seeks its initial surveillance authorization. Rather, the executive—namely the AG and DNI—bears the responsibility of moni-

> toring ongoing compliance, and although the FISC receives the executive's reports, it cannot rely on them to alter or revoke its previous surveillance authorizations.

Id. This lack of judicially supervised minimization is of special concern for attorneys. Previously, under any regime of statutorily-authorized surveillance, attorneys could rest assured that a judge had ensured that procedures designed to minimize the interception and retention of privileged conversations[14] had been implemented with the initial surveillance order, and that the implementation of these minimization procedures would be supervised on a continuing basis by judges over the life of the Title III or FISA order. These statutory minimization provisions institute the constitutional particularity requirement for wiretapping warrants;[15] the mere fact of

---

[14] Or indeed of any conversations outside of the scope of the warrant, as specified with constitutionally-required particularity.

[15] *See United States v. Daly*, 535 F.2d 434, 440 (8th Cir. 1976) (Title III minimization provision "was passed by Congress in order to comply with the constitutional mandate ... that wiretapping must be conducted with particularity."); *see also United States v. Scott*, 436 U.S. 128, 135-39 (1978) (conflating Fourth Amendment and statutory standards for minimization); *Berger v. New York*, 388 U.S. 41, 57-60, 63-64 (1967) (first suggesting such a constitutional requirement to minimize scope of wire intercepts). The government has conceded before the Foreign Intelligence Surveillance Court of Review that courts have constitutionalized the minimization requirement. *See* Supplemental Brief of the United States, Appendix A: Comparison of FISA and Title III, *In re Sealed Case*, No. 02-001 (FIS Ct. of Review filed Sep. 25, 2002) at 1 n.1.

Courts have interpreted minimization requirements to include, at a minimum, a duty to institute procedures to protect the confidentiality of privileged communications. *See, e.g., United States v. Chavez*, 533 F.2d 491, 494 (9th Cir. 1976) (approving minimization limited to attorney-client and priest-penitent calls); *United States v. Turner*, 528 F.2d 143, 157 (9th Cir. 1975) (approving minimization,

ongoing, individualized judicial supervision provided additional reassurance that the government would not become privy to legally-privileged conversations. Surveillance under the FAA lacks all these safeguards, and thus, as with surveillance under the NSA Program, the risk it poses to attorneys' privileged communications is different in both degree and kind from what came before.

Finally, the FAA allows for retention and dissemination of information deemed by the executive to fit the definition of "foreign intelligence information." Current technology permits near-infinite storage of material sucked up in the vacuum cleaner authorizations permitted by the FAA, meaning almost any privileged communication might end up stored indefinitely for future misuse.[16] Whether such information is ever used *in court* to a client's detriment is irrelevant from an ethical standpoint. As Professor Gillers advised in his declaration for CCR: "It is no answer to say that suppression is available as a remedy for any improperly intercepted communication. ... Intercepted communications may be exploited to the disadvantage of clients with no one the wiser. ... It is disclosure itself that is the evil against which

---

even in light of broad scope of monitoring, where privileged calls were excluded); *Kilgore v. Mitchell*, 623 F.2d 631, 635 (9th Cir. 1980) (noting that even prior to *Scott*, DOJ Title III policy mandated minimization of privileged calls); *United States v. Rizzo*, 491 F.2d 215, 217 (2d Cir. 1974) (minimization requirement met where officers instructed not to—and did not—monitor, record or spot-check privileged conversations).

[16] *See generally* James Bamford, Inside the Matrix: The NSA Is Building the Country's Biggest Spy Center, Wired (Mar. 15, 2012) (noting "'stuff we've already stored'" at NSA may be cracked by future decryption technology), *available at* http://www.wired.com/threatlevel/2012/03/ff_nsadatacenter/all/.

lawyers must protect clients, regardless of any additional consequences of the disclosure."[17]

It is clear that the government's eavesdropping over the last decade has not excluded attorneys from surveillance. In addition to the cautionary example presented by the *Al-Haramain* case, the executive has acknowledged in a formal submission to Congress that, "[a]lthough the [NSA] program does not specifically target the communications of attorneys or physicians, calls involving such persons would not be categorically excluded from interception."[18] According to the *New York Times*, "[t]he Justice Department does not deny that the government has monitored phone calls and e-mail exchanges between lawyers and their clients as part of its terrorism investigations in the United States and overseas," and the *Times* further reported that "[t]wo senior Justice Department officials" admitted that "they knew of ... a handful of terrorism cases ... in which the government might have monitored lawyer-client conversations.[19] In CCR's own litigation challenging the NSA program, the government conceded before the district court that it would be a "reasonable inference" to conclude from these statements of government officials "that some attorney-client communications may have been surveilled under" the Program.[20]

Accordingly, like the other amici, CCR staffers have reacted to the FAA in much the same way they did to the

---

[17] Gillers Aff., *supra* note 12, ¶ 11.

[18] Assistant Attorney General William E. Moschella, Responses to Joint Questions from House Judiciary Committee Minority Members (Mar. 24, 2006) at 15, ¶45, *available at* http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf (last visited Sep. 20, 2012).

[19] Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. Times (Apr. 28, 2008), at A14.

[20] *See* Defs. Reply Br., Dkt. 49, *CCR v. Bush*, No. 07-1115 (N.D. Cal.) at 4.

announcement of the NSA Program's existence: avoiding engaging in some communications, taking costly measures to protect others. Important conversations have been delayed until in-person meetings could be scheduled, sometimes taking months before international travel could take place. The mails and international courier services have been used on the premise that one can at least tell whether physical correspondence has been opened. Undersigned counsel has frequently done both in the years since the FAA became law, as well as attempting to implement more secure electronic communications mechanisms including encrypted chat.

While the obligation to protect the most sensitive communications is ethically obligatory, precautions like those described in this brief always involve application of judgment.[21] Similarly, the extent to which more caution has been used in the wake of the FAA is a question of kind and degree. Attorneys have always used discretion and basic common-sense precautions against the risk of governmental interception or accidental disclosure. The FAA's novelty is that nearly every international communication now requires some degree of vigilance, given the breadth of surveillance possible under the statute. Whereas previously, confidential communications with parties lacking any colorable connection to terrorism in the government's view—an expert, an innocent witness to violence—would not have triggered worries of government surveillance (even under the standard of the

---

[21] For example, Professor Gillers stated in his declaration in CCR's case that "[s]ome communications ... may, in an attorney's professional opinion, be sufficiently innocuous that ... they may be transmitted electronically or by telephone. ...[T]he attorney must balance the urgency of the communication need, the substance of the communication," and, most significantly, whether disclosure would "in the attorney's considered judgment harm the client's cause." Gillers Aff. ¶11, *supra* note 12; *cf.* Resp. Br. at 20.

NSA Program), now that is no longer the case. The risks presented should our government share intercepted "foreign intelligence information" about such parties with foreign governments hostile to them are easy to imagine.

Finally, while it is true that interceptions by foreign governments or interceptions otherwise not subject to statutory regulation[22] have always been theoretically possible, the risk they presented has always been in CCR's estimation far less than the risk of U.S. government surveillance (which would largely have been judicially supervised under FISA).[23] Many of the foreign governments amici must contend with are far less technologically capable than the United States. (Undersigned counsel has frequently sought advice about technological capacities of foreign governments from experts—for instance, deciding last year after such a consultation that a former Soviet Central Asian republic was likely incapable of breaking encryption on a popular, free communications package we used to discuss a now-fully-resolved matter with a client.) Likewise every indication is that the U.S. government carries out the bulk of its non-wireless-telephone interceptions of international communications by intercepting terrestrial fiber-optic signals in a fashion that should have been subject to close judicial oversight under the pre-FAA version of FISA.[24]

---

[22] *See* Pet. Br. at 32-33 (noting categories of surveillance exempted by 95th Congress from FISA).

[23] FISA has always defined "electronic surveillance" to include "acquisition occur[ing] in the United States," 50 U.S.C. § 1801(f)(2). Combined with the fact that most intercepts, even of fully international calls, happen inside the U.S. (*see* footnote 24, *infra*), this meant amici could rationally assume (prior to the NSA Program's disclosure) that most (non-cellphone) surveillance by the U.S. was judicially regulated.

[24] *See, e.g.*, Resp. Br. at 9-10 (citing to treatise by former AAG of National Security Division of DOJ, David S. Kris, whose view is that

The very fact that the government chose to implement an NSA Program—which was acknowledged and conceded by Attorney General Gonzales to constitute "electronic surveillance" as defined in and governed by FISA[25]—is another sign that the most convenient means of interception are those subject to regulation under FISA. Consistent with this, the government has never chosen to vigorously press in district court the claim that plaintiffs should have already been equally fearful of the possibility of other, unregulated forms of interception in any detail, in this or any of the other similar litigation over the last six years.[26]

FAA surveillance is directed at "gateway" switches); JAMES RISEN, STATE OF WAR 48-49 (2006) (NSA Program accessed "large telecommunications switches" "physically based in the United States" that make it possible to monitor even fully international calls (e.g. from Asia to the Middle East) while they are digitally "transiting" these U.S.-based switches); *id.* at 51 (U.S. government has successfully been "quietly encouraging" telecom industry to route most international telecom traffic "through American-based switches"); JAMES BAMFORD, BODY OF SECRETS 207-11 (2008) (same, quoting NSA Director Alexander: "a vast portion of the world's communications infrastructure [is] located in our own nation"); Bamford, Inside the Matrix, *supra* note 16 (quoting named NSA official as voicing preference for now tapping into U.S.-based switching "junction points" over previously favored U.S.-based "cable landings" where international undersea cables enter U.S.).

[25] *See* Alberto Gonzales, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence* (Dec. 19, 2005).

[26] *See, e.g.*, *CCR v. Bush*, No. 07-1115 (N.D. Cal.), and *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), the CCR and ACLU lawsuits against the NSA program.

Injuries such as those suffered by plaintiffs and amici are legally sufficient to underlie standing

Even the brief survey of amici above shows that the injuries asserted by plaintiffs were broadly shared by the admittedly small group of public interest lawyers who routinely litigate terrorism cases. The commonsense nature of the injury is surely why the government did not contest the averments of injury at all below—neither in this case nor in the several other similar standing cases arising out of the NSA Program before it.

Laird and subsequent chilling effect cases show a concern about the "objectivity" of two elements of the standing analysis: first, that the fear causing plaintiffs to act or be deterred from acting should be *objectively reasonable*; and second, that the harm asserted be something tangible—what is referred to as "concrete harm" in the many post-*Laird* pronouncements from this Court on standing—and therefore *objective* in that sense. Where either the fear or the harm are overly subjective (as in *Laird*, where plaintiffs had no more than half-hearted assertions regarding psychological anxieties provoked by the army's lawful monitoring), standing will not be found. But where plaintiffs can produce evidence of the objective reasonableness of their fears resulting from government action,[27] and can also point to consequent objective harm (such as the "professional" harm asserted here, and relied on by this Court in *Meese v. Keene*, 481 U.S. 465, 473 (1987)), they have established a sufficient basis for standing.

Laird's dictum that "allegations of a subjective 'chill'," without more, cannot by themselves underlie

---

[27] The uncontested expert opinion of Professor Gillers that certain responsive measures are obligatory for attorneys as a matter of professional responsibility surely places the objectivity of plaintiffs' concerns beyond doubt.

standing[28] does not mean that standing is absent in every case where plaintiffs' fear of government conduct motivates them to elect to take actions that proximately cause their own injuries. Instead (to restate the standard in positive terms), courts have demanded that plaintiffs in chilling effect cases must have a reasonable (*i.e.* non-subjective) fear that causes them to incur a concrete, objective harm (*i.e.* something going beyond mere subjective anxiety[29]).

The *Laird* plaintiffs failed the first prong—they lacked an objectively reasonable *cause* to be afraid of government monitoring that "was 'nothing more than a good newspaper reporter would be able to gather by attendance at [their] public meetings,'" *Laird*, 408 U.S. at 9—and the second prong (concrete, objective harm) as well. *See id.* at 14 n.7 (plaintiffs "have also cast considerable doubt on whether they themselves are in fact suffering [any injury]... before the District Court, counsel ... admitted that his clients were 'not people, obviously, who are cowed and chilled'.... But, counsel argued, [they] must 'represent millions of Americans not nearly as forward [and] courageous' as themselves."); *Tatum v. Laird*, 444 F.2d 947, 959 (D.C. Cir. 1971) (MacKinnon, J., concurring in part) (same).

In the instant case, both prongs are satisfied: the fears are objectively reasonable (indeed, they are ethically mandated), and the expenses and professional harms incurred are clearly tangible.[30]

---

[28] *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

[29] In contrast, in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the injury claimed to underlie standing for prospective relief was only a subjective fear of being subjected to a similar chokehold in the future. *See id.* at 98, 107 n.8.

[30] The government relies on a CCR case, *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) (Scalia, J.) (*UPC*), for the notion that chilling-effect surveillance plaintiffs must prove

they will actually be subject to surveillance. Pet. Br. at 40-41 ("non-conjectural ... imminent interception" required). *UPC* was a challenge to a 1981 executive order that set forth procedures for the division of labor between the FBI and other foreign intelligence agencies in carrying out surveillance. The order is reproduced in then-Judge Scalia's opinion; although it makes no mention of the authority for such surveillance, it seems on its face that most of the order related to operational procedures for agencies seeking FISA warrants. Nowhere does the order set forth any warrantless wiretapping procedures, and in fact it was ostensibly designed to *eliminate* illegal surveillance (in the wake of the Church Committee investigations, *see, e.g.*, 738 F.2d at 1382 n.3). While plaintiffs claimed they experienced chilling effects from the fact that the order might govern the process for making them targets under FISA, they made absolutely no claim against FISA itself. The only allegations of illegality they made related to government actions *prior* to the order that their claims were directed at, as the District Court opinion makes clear. *See United Presbyterian Church v. Reagan*, 557 F. Supp. 61, 63 (D.D.C. 1982) ("Nor do [plaintiffs] make any allegations to support the assumption that any intelligence-gathering activities that may take place pursuant to the Order in the future will be illegal. Plaintiff has conceded at oral argument that much of the activity authorized by the Order is well within the strictures of the Constitution and laws of the United States."). Plaintiffs' failure in *UPC* was not that they did not show they were *actual targets* of an illegal program. Rather, they failed to make *any plausible claim of illegality*, no less any other showing of being affected by the practices at issue. Like the *Laird* plaintiffs, the *UPC* plaintiffs were worried about how a lawful system might be put to unlawful uses against them in the future.

Nor were the *UPC* plaintiffs a group especially vulnerable to warrantless surveillance because of the risk of legally-recognized communications privileges being violated, as in the instant case. The *UPC* plaintiffs claimed only that they were political and religious activists, journalists, and academics. The original complaint, which undersigned counsel located in the National Archives, does not indicate that there were any attorneys in the group; although apparently one individual plaintiff (Severina Rivera) was in fact an attorney, the complaint makes absolutely no mention of that fact. *See* Complaint, *United Presbyterian Church v. Reagan*, Civil Action No. 82-1824 (D.D.C. Jun. 30, 1982), at ¶¶ 60-61.

CONCLUSION

Plaintiffs have documented harms that parallel those amici have experienced in their own practices. They clearly have standing under existing law. The government argues that challenges to surveillance programs should meet a unique, heightened standing threshold. If anything, the opposite should be true: surveillance policies that hamstring those few attorneys engaged in the task of ensuring executive accountability by bringing claims before the judiciary are worthy of more thorough scrutiny from the federal courts, not less. Closing the courthouse doors to such claims risks a systemic harm: a corrosion of the ability of the judiciary to confront *other* unlawful behavior of the executive.

There is nothing formulaic about standing analysis. Rather, courts have decided cases by asking if the injury is real, looking beyond algebraic formulas and rough analogies to cases past to ask whether the policies underlying the standing requirement are being served. Those policies include preserving the separation of powers—by avoiding advisory opinions, on the one hand, but also by not refraining from preventing overreach by the political branches when only the courts are in a position to do so, and by preserving the rights of individuals against the state. That is particularly important when the courts are called on to ensure the continuing vitality of public-interest litigation of constitutional issues, which is the very interest the attorney plaintiffs claim injury to. Moreover there is no risk that recognizing standing here would open a floodgate of litigation: lawyers routinely litigating international terrorism cases have very specific claims of vulnerability to surveillance that is not subject to judicially-supervised minimization, and belong to a very narrow class of persons capable of making such claims.

While courts are rightly concerned to ensure zealous advocacy by only hearing genuinely adverse controversies, it would be ironic to conclude that the government's failure to factually contest the claims of injury below should be held against plaintiffs trying to preserve the very confidentiality of privileged communications that underpins our system of adversary justice. The reason the government did not seriously contest these injuries—and has not done so in any of the similar surveillance cases brought since December 2005—is that every sensible, similarly-situated lawyer would do the same thing these public-interest attorneys have done. Affirming the judgment of the court of appeals would therefore vindicate the system of judicial review in which both the courts and these amici play a vital part.

Dated: September 24, 2012

Respectfully submitted,

SHAYANA KADIDAL
Counsel of Record
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(646) 498-8498
kadidal@ccrjustice.org

APPENDIX

APPENDIX: LIST OF AMICI CURIAE

The Center for Constitutional Rights ("CCR") is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements and activists in the South, CCR has over the last four decades litigated many significant cases in the areas of constitutional and human rights. Among these is the landmark warrantless wiretapping case *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972).

The Center has twice litigated Guantánamo detainee cases to this Court, in *Rasul v. Bush*, 542 U.S. 466 (2004) and *Boumediene v. Bush*, 553 U.S. 723 (2008), and since *Rasul* has coordinated the work of the hundreds of outside counsel working on individual detainees' cases. CCR also represents a number of other clients whose rights have been violated by detention and intelligence gathering practices instituted in the wake of the terrorist attacks of September 11, 2001, including, among others, representatives of a potential class of hundreds of Muslim foreign nationals detained in the wake of September 11 and labeled as "of interest" to the investigation of the attacks without cause, and Maher Arar, a Canadian citizen stopped while changing planes at JFK Airport in New York while on his way home to Canada, and instead rendered to Syria, where he was tortured and detained without charges for nearly a year, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010). The clients in all of these cases are individuals, now located overseas, who have been alleged by the government at some point to have had some association—

however attenuated or unsubstantiated by evidence—with terrorism.

CCR and a number of its legal staff are plaintiffs in a challenge to the NSA warrantless wiretapping program first disclosed by the *New York Times* in December 2005, *Center for Constitutional Rights v. Bush*, No. 06-cv-313 (S.D.N.Y., filed Jan. 17, 2006), subsequently transferred to San Francisco by the Multidistrict Litigation Panel as No. 3:07-cv-1115 (N.D. Cal.) and currently on appeal to the Ninth Circuit (No. 11-15956). The Center also litigated a FOIA action seeking records of NSA surveillance of habeas attorneys for Guantánamo detainees, *Wilner v. NSA*, 2008 WL 2567765 (S.D.N.Y. 2008) (dismissing), *aff'd*, 592 F.3d 60 (2d. Cir. 2009), *cert denied*, 131 S. Ct. 387 (2010).

Tina Monshipour Foster is a New York-based human and civil rights attorney. She is the founder and Executive Director of the International Justice Network, a not-for-profit organization which helps victims of human rights abuses and their communities access legal assistance through a global network of leading human rights attorneys, academics, advocates, NGOs, and grassroots organizations. The majority of her clients are indigent Arab and Muslims who she represents on a *pro bono* basis. A large number of these individuals are current or former prisoners held without charge in United States custody overseas, at Guantánamo Bay, Cuba or Bagram Airfield in Afghanistan.

Ms. Foster previously was a staff attorney at the Center for Constitutional Rights and held a part-time position at Yale Law School working with the National Litigation Project of the Allard K. Lowenstein International Human Rights Clinic under the leadership of Harold Hongju Koh (former Dean of the law school and current Legal Advisor to the Department of State), where

she provided strategic advice and financial assistance to other attorneys and advocates collaborating on such cases around the country. Attorneys at both organizations have directly represented or served as amicus counsel on dozens of cases on behalf of current or former detainees held at Guantánamo and other U.S. military prisons. At CCR she appeared on, assisted with, and coordinated many of the first petitions filed on behalf of detainees at Guantánamo in the wake of this Court's decision in *Rasul v. Bush*.

Ramzi Kassem is Associate Professor of Law at the City University of New York School of Law. He directs the Immigrant & Non-Citizen Rights Clinic. Through that program, with his students, Professor Kassem represents prisoners of various nationalities presently or formerly held at American facilities at Guantánamo Bay, Cuba, at Bagram Air Base, Afghanistan, at so-called "Black Sites," and at other detention sites worldwide. In connection with these cases, Professor Kassem and his students have appeared before U.S. federal district and appellate courts, as well as before the military commissions at Guantánamo.

Professor Kassem also supervises the Creating Law Enforcement Accountability & Responsibility project (CLEAR), which primarily aims to address the legal needs of Muslim, Arab, South Asian, and other communities in the New York City area that are particularly affected by national security and counterterrorism policies and practices. CLEAR has represented or advised over 50 clients since its inception, partnered with over 20 community-based coalitions on various initiatives, and facilitated over 60 know-your-rights workshops at 35 different mosques, community centers and student associations across the region.

Before joining the CUNY law faculty in 2009, Professor Kassem was a Robert M. Cover Teaching Fellow and Lecturer in Law at Yale Law School, where he taught in the Civil Liberties & National Security Clinic as well as the Worker & Immigrant Rights & Advocacy Clinic. Professor Kassem also previously was Adjunct Professor of Law at Fordham University School of Law, where he taught in the International Justice Clinic.

H. Candace Gorman is the principal in the law firm of H. Candace Gorman located in Chicago, Illinois. She comes from a family of attorneys and has herself been an attorney for thirty years. She graduated from the University of Wisconsin with a B.A. in Philosophy in 1976 and from John Marshall Law School with a J.D. in January 1983. She argued and won a unanimous decision before this Court in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) (applying four-year federal statute of limitations to Section 1981 cases).

Ms. Gorman has served on the Board of Directors and as President of the Women's Bar Association of Illinois; the Board of Directors for the Federal Bar Association in the Northern District of Illinois; the Merit Selection Panel for United States Magistrates; and the Task Force Planning Committee for the Illinois Supreme Court's Study of Gender Bias in the Courtroom. She was the Legislative Chair and Commissioner on the Chicago Commission on Women, and a member of the National Employment Lawyers Association where she sat on the Board of Directors for the Illinois Division from approximately 1992-99. She has also lectured widely on the subject of human rights and civil rights, having represented two detainees at Guantánamo in habeas corpus proceedings, Abdul Hamid Al-Ghizzawi and Abdal Razak Ali.

Thomas H. Nelson is an attorney based in Welches, Oregon. After graduating with a B.A. from the University of Washington in 1966, he spent four years as a Peace Corps volunteer in Iran, first teaching and then, following the Khorrassan earthquake of 1968, working in relief and reconstruction activities. After he returned to the United States he attended Valparaiso Law School, receiving a J.D. with High Distinction in 1973; he then received a Sterling Fellowship to study at Yale Law School, earning an L.L.M. in 1974. After four years as a law professor at Connecticut and Valparaiso, he entered private practice in Portland, Oregon, working primarily on utilities regulation for the next decade. Starting around 2000, he became more active in civil and human rights activities on behalf of Native Americans and Palestinians.

In March 2004 he represented a local attorney and Muslim, Brandon Mayfield, who was falsely accused of participation in the Madrid train bombing of that year. As a result of the national attention given to that case, Mr. Nelson was contacted by attorneys for the Al-Haramain Islamic Foundation of Ashland, Oregon and asked to represent the charity in a number of matters stemming from the freezing of its assets in Oregon by the Department of the Treasury, and since then has been the primary attorney for the Oregon charity and the main liaison both to its personnel in Riyadh, Saudi Arabia and its attorneys in the United States.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1025

IN THE
Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, *et al.*,

Petitioners,

v.

AMNESTY INTERNATIONAL USA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE COMMITTEE ON CIVIL RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

KATHERINE A. ROCCO
SECRETARY, COMMITTEE ON CIVIL RIGHTS
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
825 Eighth Avenue
New York, NY 10019
(212) 474-1255

PETER T. BARBUR
Counsel of Record
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
pbarbur@cravath.com

ZACHARY KERNER
CHARLES AGOOS
JAMES G. FELAKOS
SEBASTIAN RICCARDI
MEGAN H. WHITTAKER
On the Brief

Counsel for Amicus Curiae

September 24, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

I. The Uncontroverted Testimony Shows that Plaintiffs Have Incurred Substantial Professional and Economic Costs to Avoid Risking Disclosure of Their Clients' Confidences 3

II. These Professional and Economic Costs Are Cognizable Injuries Under This Court's Current Standing Doctrine 6

III. Plaintiffs Are Required by Ethical Rules to Take Reasonable Measures to Safeguard Their Clients' Confidences and to Provide Competent Representation Under the Circumstances 7

A. Relevant Rules of Professional Responsibility 7

B. The FAA Implicates Plaintiffs' Ethical Obligations and Presents Them with an Untenable Ethical and Professional Dilemma 12

Page

IV. Plaintiffs Incurred Costs As a Direct Result of the FAA's Expanded Surveillance Powers, Such That Their Injuries Are "Fairly Traceable" to the Government's Challenged Conduct 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Amnesty Intern. USA v. Clapper, 638 F.3d 118 (2d Cir. 2012) ..... passim

Amnesty Intern. USA v. Clapper, 667 F.3d 163 (Lynch, *J.*, concurring in denial of reh'g en banc) 12

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) 19

Clinton v. City of New York, 524 U.S. 417 (1998) 6

F.T.C. v. Grolier Inc., 462 U.S. 19 (1983) (Brennan, *J.*, concurring) 10

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000) 18

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 18

Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) 7

Hickman v. Taylor, 329 U.S. 495 (1947) 10, 19

Horne v. Flores, 129 S. Ct. 2579 (2009) 6

Jaffee v. Redmond, 518 U.S. 1 (1996) 10

Page(s)

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 6, 17

Meese v. Keene, 481 U.S. 465 (1987) 6, 18

St. Pierre v. Dyer, 208 F.3d 394 (2d Cir. 2000) 17, 19

Swidler & Berlin v. United States, 524 U.S. 399 (1998) 10

United States v. Richardson, 418 U.S. 166 (1974) (Powell, *J.*, concurring) 7

Upjohn Co. v. United States, 449 U.S. 383 (1981) 10, 15

Statutes & Rules

50 U.S.C. § 1881(e) 3

50 U.S.C. § 1881a(i)(2) 12

50 U.S.C. § 1881a(i)(3)(A) 12

50 U.S.C. § 1881a(a) 3

50 U.S.C § 1881a(g)(4) 12

Rule 1.1, District of Columbia Rules of Prof'l Conduct 11

Rule 1.3, Comment [1], District of Columbia Rules of Prof'l Conduct 11

Page(s)

FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA") 2

Rule 1.1, Idaho Rules of Prof'l Conduct 11

Rule 1.3, Comment [1], Idaho Rules of Prof'l Conduct 11

Model Rule 1.1 ..... 11, 15

Model Rule 1.1 cmt. [5] 11, 15

Model Rule 1.3 11

Model Rule 1.3 cmt. [1] 11

Model Rule 1.4 11

Model Rule 1.4 cmt. [1] 12

Model Rule 1.6 ..... 8, 9

Model Rule 1.6(a) 8

Model Rule 1.6(c) 8

Model Rule 1.6 cmt. [1] 8

Model Rule 1.6 cmt. [2] 9

Model Rule 1.6 cmt. [3] 8

Model Rule 1.6 cmt. [19] 8, 14

Rule 1.6, Comment [17], Idaho Rules of Prof'l Conduct 8

Page(s)

Rule 1.6, Comment [18], Idaho Rules of Prof'l Conduct 8

Rule 1.6, Comment [40], District of Columbia Rules of Prof'l Conduct 8

Other Authorities

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 413 (1999)..... 9

13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531.5 (3d ed. 2008) 17

NYC Bar Ass'n, Formal Op. 11 (1994)..... 9

NYS Bar Ass'n Comm. on Prof'l Ethics Op. 709 (1998) 9

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded in 1870, the New York City Bar Association (the "Association") is a professional organization of more than 23,000 attorneys. Through its many standing committees, such as its Committee on Civil Rights, the Association educates the Bar and the public about legal issues relating to civil rights, including the right of access to the courts and the right to remain free from unreasonable searches and seizures. The Association also seeks to promote effective assistance of counsel for everyone, including those suspected or accused of criminal wrongdoing, and is especially concerned with protecting the confidentiality of attorney-client communications as essential to such representation.

Over the past several years, the Association has attempted to demonstrate by various means—including through the filing of *amicus curiae* briefs—that individual liberties need not be subverted by governmental interests during times of war and that national security can be achieved without prejudice to the constitutional rights that are at the heart of our democracy.

---

[1] The parties have consented to the filing of this brief, and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

In filing this brief, the Association is advocating the interests of its members in maintaining the ethical requirements of the legal profession. The statute at issue here affects confidential communications and impairs the attorney-client relationship. The government's legal position fails to take seriously the attorney-client relationship, and thus the judicial process itself, both through the substance of the statute and the follow-on attempt to deprive even the most directly-affected lawyers of standing to challenge the statute in court.

SUMMARY OF ARGUMENT

A lawyer owes an inviolate duty of confidentiality to her client. Where there is a reasonable risk that a sensitive communication will be overheard by a third-party, a lawyer must refrain from making that communication. Under the broad terms of the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA"), there is a reasonable likelihood that the government will overhear the communications between certain lawyers and their clients. In response, these lawyers have taken certain safeguard measures that have resulted in a variety of costs: professional, economic, and ethical.

These costs are sufficient to confer standing upon plaintiffs Sylvia Royce and Scott McKay to challenge the constitutionality of the FAA. First, the uncontroverted testimony demonstrates the measures they have taken, and the resulting costs, to avoid risking disclosure of their clients' sensitive information. These costs are a cognizable injury under this Court's standing jurisprudence. Second,

the uncontroverted evidence shows that plaintiffs took these measures because of the FAA, such that their injuries are "fairly traceable" to the government's conduct. Although the government characterizes plaintiffs' injuries as "voluntary" and "self-inflicted," in fact plaintiffs' ethical obligations leave them no legitimate choice but to incur these costs.

I. The Uncontroverted Testimony Shows that Plaintiffs Have Incurred Substantial Professional and Economic Costs to Avoid Risking Disclosure of Their Clients' Confidences

Attorneys Sylvia Royce and Scott McKay are plaintiffs in this action. Their clients consist of accused terrorists and Guantánamo Bay detainees. The FAA allows the government to issue surveillance orders to monitor individual communications whenever two conditions are met: (1) one of the parties to the conversation is reasonably believed to be located outside the United States, and (2) the purpose of the surveillance is to obtain information concerning terrorism, national defense, or foreign affairs. 50 U.S.C. § 1881a(a); *id.* § 1801(e).[2] Ms. Royce and Mr. McKay regularly discuss their cases with individuals located outside the U.S. because they have clients who were born abroad, have family

---

[2] *See generally Amnesty Int'l. USA v. Clapper*, 638 F.3d 118, 138 (2d Cir. 2012) (noting that "[t]he FAA is susceptible to such an interpretation, and the government has not controverted this interpretation or offered a more compelling one").

and acquaintances abroad, and/or were alleged to have taken certain illegal actions abroad. Due to the nature of the allegations against their clients, these conversations invariably "relate" to "terrorism, national defense, or foreign affairs." Taken together, their communications involve "precisely the sorts of individuals that the government will most likely seek to monitor," and "precisely the kind of information that [the FAA] authorizes the government to collect," *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 138–39 (2d Cir. 2012); Resp. Br. at 16—including, among other things:

- communications related to representation of accused terrorists, Pet. App. 370a–374a (McKay Decl. ¶¶ 5, 7, 12);

- communications with relatives of Guantánamo Bay detainees, Pet. App. 350a–351a (Royce Decl. ¶ 5); and

- communications with attorneys or co-counsel overseas, Pet. App. 351a (Royce Decl. ¶ 6)

It is thus entirely reasonable for Ms. Royce and Mr. McKay, and lawyers like them, to fear that the U.S. government will monitor phone calls and emails related to their representation of these clients. The proposition that they are, indeed, being monitored is very likely. *See Clapper*, 638 F.3d at 133-34.

The threat that the government is monitoring and intercepting international communications presents particularly acute problems for lawyers. As discussed in more detail in Section III below, lawyers owe their clients an affirmative duty to prevent a

third-party—especially an adversary—from learning about confidential information. With this duty in mind, Ms. Royce and Mr. McKay have had to change the way they communicate and investigate their cases. As Mr. McKay explains:

> The measures that we take in order to protect the confidentiality of sensitive information are far from costless. Collecting information in person sometimes requires travel that is both time-consuming and expensive. In some cases, of course, travel is impractical or prohibitively expensive, which means that we are faced with a choice between asking experts, investigators or witnesses to share sensitive information over the phone or by email or alternatively, forgoing the information altogether.

Pet. App. 372a–373a (McKay Decl. ¶ 10.) Not surprisingly, Mr. McKay concludes, these costs have "a real effect on our ability to properly represent our clients." Pet. App. 372a–373a (McKay Decl. ¶ 10.) Ms. Royce's experience is similar:

> My journalistic and human rights contacts approach me from time to time with information they have obtained by interviewing persons whose testimony may be material to Mr. [Mohammedou Ould] Salahi's case. . . . The increased risk of government surveillance means that in some cases journalists and researchers will limit the information they share with me, or that I must limit the information I share

> with them. For example, in a recent telephone call I cut off a German journalist because the information we were discussing, which related to a potential witness, was not something to which I would want the government to be privy.

Pet. App. 352a–353a (Royce Decl. ¶ 8.)[3]

II. These Professional and Economic Costs Are Cognizable Injuries Under This Court's Current Standing Doctrine

As the section above demonstrates, the uncontroverted evidence shows that Royce and McKay have already suffered actual professional and economic harms as a result of their efforts to protect the confidentiality of certain communications likely to be intercepted by the government under the authority granted by the FAA. These harms are real, not speculative. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *accord Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009). The Second Circuit correctly concluded that there is "little doubt that the plaintiffs have satisfied the injury-in-fact requirement." *Clapper*, 638 F.3d at 133. This Court has consistently found professional and economic costs of this nature to be cognizable injuries for standing purposes. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 430–32 (1998) (economic costs as

---

[3] As the ACLU noted in its merit brief, Ms. Royce no longer represents this prisoner, but she continues to represent individuals held in the custody of the U.S. military overseas. *See* Resp. Br. at 15 n. 11.

cognizable injury); *Meese v. Keene*, 481 U.S. 465, 473 (1987) (harm to professional reputation of lawyer and state legislator as cognizable injury); *see also Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 642 (2007) ("In the case of economic or physical harms . . . the 'injury in fact' question is straightforward.").

It bears noting that Ms. Royce and Mr. McKay are uniquely impacted by the government's surveillance laws in ways that most people are not. *See United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, *J.*, concurring) (standing ensures that federal courts do not resolve "public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens"). As criminal defense lawyers with clients accused of terrorism, they regularly communicate with individuals located abroad about matters relating to the foreign affairs of the United States. Thus, they comprise a discrete group of attorneys who genuinely fear that their client communications will be intercepted. *See Clapper*, 638 F.3d at 133–34.

III. Plaintiffs Are Required by Ethical Rules to Take Reasonable Measures to Safeguard Their Clients' Confidences and to Provide Competent Representation Under the Circumstances

A. Relevant Rules of Professional Responsibility

Ms. Royce and Mr. McKay practice law in Washington, D.C. and Idaho, respectively. Both jurisdictions have professional conduct rules for

lawyers that are substantially the same as (though not identical to) the American Bar Association's Model Rules of Professional Conduct ("Model Rules"). Pet. App. 378a–379a (Gillers Decl. ¶ 4.) For ease of reference and consistency, we address the Model Rules here but cite to the specific rules of Washington, D.C. and Idaho where appropriate.

Model Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ." Confidential information under Model Rule 1.6 is a broad category that includes both privileged information and other information gained in representing the client from any source.[4] Pet. App. 379a–380a (Gillers Decl. ¶ 8.) Under the Model Rules, a lawyer has an affirmative duty to safeguard confidential information: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Model Rule 1.6(c).[5] When transmitting confidential information, a lawyer "must take reasonable precautions to prevent the information

---

[4] *See* Model Rule 1.6 cmt. [1] ("This Rule governs the disclosure by a lawyer of *information relating to the representation of a client* during the lawyer's representation of the client.") (emphasis added); cmt. [3] ("The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to *all information relating to the representation, whatever its source.*") (emphasis added).

[5] *See also* Rule 1.6, Comments [17], [18], Idaho Rules of Prof'l Conduct, effective July 1, 2004; Rule 1.6, Comment [40], District of Columbia Rules of Prof'l Conduct, effective Feb. 1, 2007.

from coming into the hands of unintended recipients." Model Rule 1.6 cmt. [19]. According to the American Bar Association, the organization that promulgated the Model Rules, the effect of Model Rule 1.6 is that a lawyer violates her ethical obligations if she divulges sensitive information about a client by using a method of communication over which she does not have "a reasonable expectation of privacy." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 413 (1999); *see also* Pet. App. 380a–381a (Gillers Decl. ¶ 9); NYS Bar Ass'n Comm. on Prof'l Ethics Op. 709 (1998) ("[I]n circumstances in which a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception, or where the confidential information at issue is of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer's control, the lawyer *must select a more secure means of communication* than unencrypted Internet e-mail.") (emphasis added).[6]

The duty to keep client confidences is fundamental to "the trust that is the hallmark of the client-lawyer relationship," for it encourages clients "to seek legal assistance and to communicate fully

---

[6] The New York City Bar Association has stated that "a lawyer should exercise caution when engaging in conversations containing or concerning client confidences or secrets by cellular or cordless telephones or other communication devices readily capable of interception, and should consider taking steps sufficient to ensure the security of such conversations." NYC Bar Ass'n, Formal Op. 11 (1994).

and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Model Rule 1.6 cmt. [2]; *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). This Court has repeatedly stated that the ability of a lawyer to expect a degree of privacy in her work product is the "historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *see also Upjohn Co.*, 449 U.S. at 389; *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). This Court in *Hickman* described the consequences of not protecting a lawyer's work product as nothing short of devastating:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 511; *accord F.T.C. v. Grolier Inc.*, 462 U.S. 19, 31 (1983) (Brennan, *J.*, concurring) (finding that the need for work–product protection is essential even after active litigation ends, for "[a]ny litigants who face litigation of a commonly-recurring type [such as] civil rights or civil liberties

organizations . . . have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes"). This reasoning applies *a fortiori* to lawyers engaged in defending clients from criminal or military charges.

The FAA implicates other ethical duties as well. Model Rule 1.1 requires a lawyer to provide "competent representation," which requires "inquiry into and analysis of the factual and legal elements of the problem" and "adequate preparation."[7] Model Rule 1.1 cmt. [5] Significantly, "[t]he required attention and preparation are determined in part by what is at stake." *Id.* A Comment to Model Rule 1.3 elaborates on a lawyer's duty to be diligent, stating that a lawyer "should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[8] Model Rule 1.3 cmt. [1]. Under Model Rule 1.4, an attorney also owes his or her client a duty of communication, pursuant to which the client's objectives are to be accomplished. The Comments to Model Rule 1.4 emphasize the importance of this communication to

---

[7] *See also* Rule 1.1, District of Columbia Rules of Prof'l Conduct, effective Feb. 1, 2007; Rule 1.1 Idaho Rules of Professional Conduct, effective July 1, 2004.

[8] *See also* Rule 1.3, Comment [1], Idaho Rules of Prof'l Conduct. The District of Columbia Rules of Professional Conduct are nearly identical to the Model Rules, with the only difference being that they goes further to explicitly *require* such actions by the attorney. Rule 1.3, Comment [1], District of Columbia Rules of Prof'l Conduct.

the client-lawyer relationship, explaining that "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation." Model Rule 1.4 cmt. [1].

B. The FAA Implicates Plaintiffs' Ethical Obligations and Presents Them with an Untenable Ethical and Professional Dilemma

The fear that the government will monitor lawyers' sensitive communications felt by the plaintiff lawyers is a direct result of the changes made by the FAA. The differences between the pre- and post-FAA surveillance authorization procedures make it more likely that lawyers' communications will be subject to government surveillance. As the Second Circuit explained, "the FAA indisputably and significantly broadens the risk of interception, lowers the government's probable-cause burden, and decreases the oversight role of the Foreign Intelligence Surveillance Court ("FISC")." *Amnesty Int'l. USA v. Clapper*, 667 F.3d 163, 166 (Lynch, *J.*, concurring in denial of reh'g en banc). Under Section 702 of the FAA, "the probable-cause determinations are no longer particularized," and the "Attorney General no longer needs to identify specific surveillance targets to the FISC." *Id.* (citing 50 U.S.C § 1881a(g)(4)). In addition, the FISC "no longer considers individual surveillance applications, but rather is charged only with overseeing whether the agency has complied with FISA's general procedural requirements." *Id.* (citing 50 U.S.C. § 1881a(i)(2), (3)(A)). The effects of these changes are

not lost on criminal defense attorneys like Mr. McKay:

> [T]he concerns raised by dragnet surveillance of international communications are far more serious than the concerns raised by surveillance that is based on individualized suspicion and subject to individualized judicial oversight. In the past, I have understood that certain of my communications with experts, witnesses, clients, and others could be subject to surveillance by the U.S. government, but I have also understood that this surveillance was strictly limited, judicially supervised, and subject to minimization procedures that were also supervised by judges on an individualized basis. I understood that the government had the authority to monitor my communications in certain narrow circumstances, but now my communications may be monitored simply because I am communicating with someone who is outside the country.

Pet. App. 374a–375a (McKay Decl. ¶ 13.)

Given these changes, it is highly likely that the government will actually monitor Ms. Royce and Mr. McKay's electronic communications with persons located abroad—namely, their clients, their clients' families, witnesses, investigators, human rights activists, foreign governments and journalists, among others. Their assessment that their communications will be subject to surveillance is eminently reasonable—and not credibly disputed.

As a result of this assessment, it would be implausible for Ms. Royce, for example, to conclude that there would be "a reasonable expectation of privacy" in a phone call or email to a potential witness related to her former representation of Mohammedou Ould Salahi—who, the government alleges, "acted as a liaison between al Qaeda members close to Osama bin Laden and a group of Islamic radicals living in Hamburg, Germany, some of whom planned or participated in the September 11 attacks." Pet. App. 349a–350a (Royce Decl. ¶ 4.) Similarly, Mr. McKay could not expect privacy in a communication with a potential witness related to his former representation of Khalid Sheik Mohammed—who, the government alleges, engaged in "international terrorism and an alleged criminal conspiracy involving the events of September 11, 2001,"[9] Pet. App. 373a–374a (McKay Decl. ¶ 12)—or of Sami Omar Al-Hussayen—who "was acquitted in June 2004 on terrorism charges" and who is now facing civil charges for events related to September 11. Pet. App. 369a–370a (McKay Decl. ¶ 3.) These potential witnesses and sources of information are "precisely the sorts of individuals that the government will most likely seek to monitor." *See Clapper*, 683 F.3d at 138–39. At the same time, Ms. Royce and Mr. McKay are ethically obligated to take all "reasonable precautions to prevent [confidential] information from coming into the hands of unintended recipients." Model Rule 1.6 cmt. [19]; *see*

---

[9] As the ACLU noted in its merit brief, Mr. McKay no longer represents Mr. Mohammed, but David Nevin, also a plaintiff in this case, continues to do so. *See* Resp. Br. at 15 n. 11.

also Pet. App. 381a (Gillers Decl. ¶ 11) ("Determinative of how the lawyer may proceed is . . . whether the lawyer has good reason to believe that his or her communications are reasonably likely to be intercepted, even if the interception is lawful.").

The risk that the government will intercept their communications also implicates the duty to provide "competent representation." Model Rule 1.1; *see also Upjohn Co.*, 449 U.S. at 390 (noting that the protection of client confidences is necessary and "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice"). Notably, because the stakes at issue in these cases could not be higher, Ms. Royce and Mr. McKay's ethical obligations to their clients require more attention and preparation than is required in the average lawyer-client relationship. *See* Model Rule 1.1, cmt. [5]. For instance, Mr. Mohammed is charged with capital offenses in the Military Commissions at Guantánamo for his alleged involvement with the events of September 11, Pet. App. 373a–374a (McKay Decl. ¶ 12), and Mr. Salahi has been detained in Guantánamo since 2002 and faces the prospect of being detained there indefinitely. Pet. App. 349a (Royce Decl. ¶3.) What is more, these cases have enormous consequences for the United States' national security efforts and the development of federal criminal and military law. In cases like these, lawyers must perform with the highest levels of attention and preparation in order to satisfy their obligation of competent representation under Model Rule 1.1.

Ms. Royce and Mr. McKay have testified that their ability to communicate effectively and to gather information regarding their clients' cases has been significantly hampered as a result of the threat of surveillance under the FAA, thus interfering with their ability to provide the competent representation required by ethical rules. Ms. Royce explained:

> The risk that the government will monitor my communications with co-counsel puts me in a dilemma: I would like to have an open exchange of views on legal strategy with my co-counsel, but I have a duty not to allow client confidences and legal strategy to be captured by persons outside the attorney-client relationship, and least of all the by the U.S. government, which in this case is the opposing party.

Pet. App 351a–352a (Royce Decl. ¶ 7); *see also* Pet. App. 371a–372a (McKay Decl. ¶ 8.) Their clients and witnesses are now more reluctant to discuss sensitive matters over the phone or by email. Thus, Ms. Royce and Mr. McKay, and lawyers like them, must struggle to develop and investigate their cases by locating alternative sources of information or by foregoing essential information entirely.

Many lawyers now must confront a troubling ethical and professional dilemma: either refrain from communicating sensitive but important information over the phone or by email and risk violating their duty to provide competent representation, or continue to communicate as they had prior to the FAA and violate their duty to safeguard client confidences. As the only reasonable

alternative to this ethical dilemma, many lawyers have been forced to undertake costly and burdensome measures to protect their clients' confidentiality and yet continue to provide competent representation. Some have been forced to travel great distances to conduct interviews and investigations that otherwise would have been accomplished via phone or email. This alternative, of course, is not always feasible, especially where clients and witnesses are located abroad. Lawyers who are confronted with these ethical dilemmas, like Ms. Royce and Mr. McKay, should be able to challenge the government's conduct in federal court.

IV. Plaintiffs Incurred Costs As a Direct Result of the FAA's Expanded Surveillance Powers, Such That Their Injuries Are "Fairly Traceable" to the Government's Challenged Conduct

To establish the requirements of standing, plaintiffs must also prove causation—that is, that their injuries are "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *See Lujan*, 504 U.S. at 560–61 (internal citations and alterations omitted). "The causal chain can be broken where a plaintiff's self-inflicted injury results from his 'unreasonable decision . . . to bring about a harm that he knew to be avoidable.'" *Clapper*, 638 F.3d at 133 (quoting *St. Pierre v. Dyer*, 208 F.3d 394, 403 (2d Cir. 2000)).

Contrary to the government's contention, "[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own

injury." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531.5 (3d ed. 2008). Such is foreclosed by several of this Court's precedents. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 184–85 (2000) (holding that plaintiffs' decision to curtail their recreational use of a river polluted by defendant was "entirely reasonable" and thus constituted an injury in fact); *Keene*, 481 U.S. at 475 (finding that plaintiff's "need to take . . . affirmative steps to avoid the risk of harm to his reputation constitutes a cognizable injury"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding that plaintiff's decision to devote significant resources to counteract defendant's racially discriminatory steering practices constituted a "concrete and demonstrable injury"). Although these cases focused on whether the plaintiffs had established injury-in-fact, they nonetheless held that a plaintiff who reasonably changes his or her behavior to avoid the risk of harm caused by the defendant's challenged conduct has standing. *See Laidlaw*, 528 U.S. at 184–85.

In this case, the professional code of conduct governing Ms. Royce and Mr. McKay's behavior as lawyers required them to take certain measures as a direct result of the risk posed by the FAA. Pet. App. 382a–384a (Gillers Decl. ¶¶ 14–17.) As this Court held in *Meese*, "the need to take . . . affirmative steps to avoid the risk of harm . . . constitutes a cognizable injury." *Meese*, 481 U.S. at 475. The reasonableness of Ms. Royce and Mr. McKay's efforts to maintain their clients' confidences is demonstrated by the simple fact that these measures

were required by ethical rules and, therefore, necessary "within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." *See Hickman*, 329 U.S. at 511. Since their change in behavior was reasonable, their own conduct could not have broken the chain of causation between the government's conduct and their injuries. *See Dyer*, 208 F.3d at 403. Therefore, Ms. Royce and Mr. McKay have standing to challenge the constitutionality of the FAA.

The implication in the government's position is that Ms. Royce and Mr. McKay's choice to incur travel costs or to refrain from discussing sensitive information over the phone or by email was "voluntary" or "self-inflicted" because they cannot show with sufficient certainty that they have been or will be monitored. However, as the Second Circuit noted in the decision below, "in cases where plaintiffs allege an injury based solely on prospective government action, they need only show a 'realistic danger' of 'direct injury,'" and plaintiffs have made this showing. *Clapper*, 638 F.3d at 135 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). In addition, lawyers like Ms. Royce and Mr. McKay have an affirmative duty to avoid discussing confidential information about a client over the phone or by email if they have "a reasonable expectation" that the information will be monitored by a third-party, such as the government. Because the applicable ethical rules *require* Ms. Royce and Mr. McKay to abstain from these communications—i.e., they lack the discretion *not* to abstain if they want to fulfill their mandatory ethical obligations—it cannot credibly be maintained that

their change in behavior is "voluntary" or "self-inflicted." Ms. Royce and Mr. McKay's injuries were caused by the government's challenged conduct, not their own.

CONCLUSION

The government's legal position in this case is deeply troubling because of the implications for lawyers' ability to comply with their ethical obligations. The government's contention that the plaintiff lawyers in this case do not have standing to challenge the FAA, if accepted, would do a disservice to all lawyers who treat their ethical obligations with the solemnity they deserve. The undisputed evidence clearly establishes that Ms. Royce and Mr. McKay's livelihoods have been, and continue to be, detrimentally affected by the risk that their communications with clients are being monitored under the authority granted by the FAA. These harms—which are both real and directly traceable to the government's conduct—confer standing upon the plaintiffs to challenge the constitutionality of the statute.

Respectfully Submitted

PETER T. BARBUR
Counsel of Record

CRAVATH, SWAINE & MOORE LLP

KATHERINE A. ROCCO
SECRETARY, COMMITTEE ON
CIVIL RIGHTS
THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 11-1025

In The Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL.,
Petitioners,

v.

AMNESTY INTERNATIONAL USA, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
ROCHELLE BOBROFF
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Ste 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Text and History of Article III of the Constitution Support Standing In This Case 5

A. The Framers Considered Judicial Review Essential To Protecting Liberty and Preventing Abuse of Government Power 6

B. The Drafters of Article III Created Robust Judicial Review of Legislative Action 8

C. The Framers of the Bill of Rights Relied Upon the Availability of Article III Judicial Review 12

D. Court Precedent Supports Judicial Review of Respondents' Claims 14

II. The Particular Concerns of the First Amendment Support Standing In This Case 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 18

Babbit v. American Farm Workers,
442 U.S. 289 (1979) 17

Baker v. Carr,
369 U.S. 186 (1962) 4

Chisholm v. Georgia,
2 U.S. (2 Dall.) 419 (1793) 5

Davis v. FEC,
554 U.S. 724, (2008) 18

Fairbank v. United States,
181 U.S. 283 (1901) 15

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 19

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 14, 16, 19

Massachusetts v. EPA,
549 U.S. 497 (2007) 4

TABLE OF AUTHORITIES (cont'd)

Page

M'Culloch v. Maryland,
17 U.S. 316 (1819) 14, 15

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010) 1

Meese v. Keene,
481 U.S. 465 (1987) 17

National Federation of Independent Business v. Sebelius,
132 S. Ct. 2566 (2012) 1

Norton v. Shelby County,
118 U.S. 425 (1886) 19

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) 1

Trop v. Dulles,
356 U.S. 86 (1958) 15

United States v. Munoz-Flores,
495 U.S. 385 (1990) 15, 16

Virginia v. American Booksellers' Ass'n,
484 U.S. 383 (1988) 17

TABLE OF AUTHORITIES (cont'd)

Page

Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012) 16

Constitutional Provisions and Legislative Materials

U.S. CONST.:
art. III 5
amend. I 17, 18

Annals of Congress, 1st Cong.,1st Sess. 454 (1789) 13

FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 2

Books, Articles, and Other Materials

AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005) 5

THE FEDERALIST PAPERS (Clinton Rossiter ed. 1999) 10, 11

Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 JOURNAL OF LAW AND POLITICS 459 (2012) 8, 13

LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS (1999) 13

TABLE OF AUTHORITIES (cont'd)

Page

THE PAPERS OF JAMES MADISON (William T. Hutchinson et al., eds. 1961) 12

RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. 1911) 6, 7, 8, 9, 10

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993) 4, 9, 10, 16

Otis H. Stephens, Jr., *Marbury v. Madison: 200 Years of Judicial Review in America*, 71 TENN. L. REV. 241 (2004) 15

Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) 5

Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L. J. 1257 (2009) 14

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections in Article III and the Bill of Rights. CAC has filed *amicus curiae* briefs in this Court in cases raising significant issues regarding the text and history of the original Constitution and the Bill of Rights, including *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

---

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents—including lawyers, journalists, and human rights researchers—filed a lawsuit seeking to strike down as unconstitutional the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA" or "Act"),[2] a statute that they assert invested the government with sweeping new authority to collect Americans' international communications from telecommunications facilities inside the United States. Respondents argue that "[t]he Act permits the government to collect these communications *en masse*—without having to demonstrate or even assert to any court that any party to any of the communications is a terrorist, an agent of a foreign power, or a suspected criminal." Br. for Resp. at 1. The U.S. Court of Appeals for the Second Circuit ruled that that Plaintiffs-Respondents had standing to raise this constitutional challenge. Now, Petitioner Clapper and the federal government ask this Court to block judicial review of Respondents' challenge to these allegedly unconstitutional surveillance procedures.

The text and history of the Constitution support judicial review of Respondents' constitutional claims. The Founders crafted Article

---

[2] The challenged provision is Section 702 of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C.A. § 1881a, which was enacted in 2008 as part of the FISA Amendments Act (FAA), Pub. L. No. 110-261, sec. 101(a)(2), § 702, 122 Stat. 2438.

III's judicial power as a vital check on unlawful actions of the legislature, which is precisely what Respondents claim in this case. Fearing legislative overreach, the Constitution's Framers considered a variety of safeguards, from a judicial veto on proposed legislation to the enduring, robust judicial review ultimately written into Article III. The records of the Constitutional Convention demonstrate that the Framers were deeply concerned that the national legislature would enact laws contravening the Constitution and individual liberty. The Framers unanimously agreed that the authority of the judiciary to intervene was needed to ensure the constitutionality of national laws.

While the government suggests that the separation-of-powers concerns reflected in standing doctrine support blocking access to the courts in this case, Gov't Br. at 23, 35, history shows that allowing the judiciary to check legislative infringements on individual rights is essential to our constitutional system. Indeed, it was the assurance of robust judicial review of legislative action that encouraged the supporters of the Bill of Rights. Concerned that an enumeration of fundamental rights could end up as merely a parchment barrier to tyranny, the supporters of the Bill of Rights counted on the availability of meaningful judicial review to protect the rights and liberties set forth in the Amendments.

Of course, the Framers did not establish courts of mere complaint: James Madison and others confirmed that cases before the federal courts under Article III must be appropriate for the

judiciary to resolve, and Court precedent implements this concern by ensuring that only individuals with a redressable "injury in fact" press their claims before the courts. *See* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1232 (1993) ("The Court's recognition that injury in fact is a requirement of Article III ensures that the courts will more properly remain concerned with tasks that are, in Madison's words, 'of a Judiciary nature.'"). Because Article III requires a "case or controversy" for judicial review, "[a]t bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The unchallenged allegations of harm by Respondents meet this standard. *See* Br. of Resp. at 28-29, 32-35, 53-54.

The court of appeals correctly determined that Plaintiffs-Respondents have standing.

ARGUMENT

I. The Text and History of Article III of the Constitution Support Standing In This Case.

Article III empowers the judiciary to determine the constitutionality of laws enacted by the federal legislature. Its words provide in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority....

U.S. CONST., art. III, § 2. Article III goes on to list certain categories of "Controversies" over which the federal judicial power shall extend. *Id.*

In the 18th Century, the word "cases" was understood to encompass both civil and criminal matters, while "controversies" referred only to civil disputes. Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168 (1992) (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431-32 (1793)). Perhaps most important, the word "all" in Article III "meant just what it said: Federal courts had to be the last word in 'all' top-tier cases," including claims derived from the Constitution and federal statutes. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 228 (2005). It was crucial to the Framers of the Constitution that the federal courts serve as "the last word" in cases

arising under the Constitution, as Respondents' claims here do.

A. The Framers Considered Judicial Review Essential To Protecting Liberty and Preventing Abuse of Government Power.

The Framers crafted Article III's judicial power as a vital check on allegedly unlawful actions of the legislature. The records of the Constitutional Convention demonstrate that the Framers were deeply concerned that the national legislature would enact laws contravening the Constitution or infringing on individual liberty. They unanimously agreed that the authority of the judiciary to intervene was needed to ensure the constitutionality of national laws. After debating different possible judicial mechanisms, the Framers chose judicial review as the exclusive method for the judiciary to protect the rights of the people.

On May 29, 1787, Governor Edmund Randolph of Virginia put forth an opening proposal for the form of the national government. His plan included judicial tribunals, consisting of one or more supreme tribunals as well as inferior tribunals, that would answer "questions which may involve the national peace and harmony." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed. 1911). In addition, Randolph proposed a "council of revision," consisting of "the Executive and a convenient number of the National Judiciary . . . with authority to examine every act of the National Legislature before it shall operate." *Id.* at

21. Randolph's suggestion for a council of revision would have established a judicial veto power over federal legislation.

On June 4, 1787, the proposal for a council of revision came up for a vote, but the Framers chose to postpone its consideration. *Id.* at 94. Elbridge Gerry of Massachusetts offered an alternative proposition that only the executive would have veto power over national laws, subject to an override by two-thirds of each branch of the national legislature. *Id.* Gerry's proposal for the executive veto passed by a vote of eight states to two. *Id.* at 94-95. The Convention then voted unanimously to establish a national judiciary. *Id.* at 95.

Several of the Framers explained that they opposed the judicial veto power of the council of revision because the judiciary would be thoroughly involved in protecting the people against unconstitutional laws through judicial review. Gerry stated that the judiciary "will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality." *Id.* at 97. Rufus King of Massachusetts asserted "that the Judicial ought not to join in the negative of a Law, because the Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution." *Id.* at 109. Under this reasoning, the council of revision was unnecessary due to the expansiveness of the judicial review power.

James Madison, a supporter of the council of revision, emphasized the importance of the judicial branch operating as a check on the power of the national legislature. Judicial intervention was needed to provide "for the safety of a minority in Danger of oppression from an unjust and interested majority." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 108. While no one disputed this potential peril, judicial review was preferred by most of the Constitutional Convention delegates as the remedy.[3] In fact, "the single most important reason the Council of Revision was rejected derived from the Convention's commitment to judicial review as an integral part of the constitutional structure." Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 JOURNAL OF LAW AND POLITICS 459, 507 (2012). The Framers considered judicial review of legislative actions as an essential part of the new Constitution's system of government and a bulwark of liberty.

B. The Drafters of Article III Created Robust Judicial Review of Legislative Action.

The records of the Constitutional Convention document several changes to the proposed constitutional text that were designed to expand

---

[3] On June 6, 1787, the proposal for a council of revision was defeated by a vote of eight states to three. *Id.* at 131, 140.

the scope of the federal judicial power. The founding generation carefully selected the words of Article III to ensure that the judicial branch would have the authority to resolve disputes involving the constitutionality of federal statutes.

Madison observed on July 18, 1787, that "[s]everal criticisms ha[d] been made on the definition" of the jurisdiction of the national judiciary. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 46 (Max Farrand ed. 1911). In response to these criticisms, Madison recommended making explicit in the constitutional text "that the jurisdiction shall extend to all cases arising under the Natl. laws." *Id.* The Framers voted unanimously to adopt Madison's proposed language. Then, on August 27, William Samuel Johnson of Connecticut urged that the text of Article III reference "this Constitution," immediately before the word "laws." *Id.* at 430. His proposal was enacted without opposition.

After Johnson's suggestion to reference the Constitution directly in Article III's text, Madison "doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a judiciary nature." *Id.* No specific text was proposed to address this concern, but the Framers "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary Nature." *Id.* Madison's understanding of federal jurisdiction has been identified as consonant with this Court's standing jurisprudence. "The Court's recognition that injury

in fact is a requirement of Article III ensures that the courts will more properly remain concerned with tasks that are, in Madison's words, 'of a Judiciary nature.'" John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1232 (1993) (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430).

Discussions of judicial review during ratification affirm that Article III was intended as a bulwark against legislative overreaching that infringed upon the rights of the people. In the *Federalist Papers*, for example, both Madison and Alexander Hamilton expressed the view that the national legislative branch poses a serious threat to the rights of the people, with judicial review as the constitutional means of preventing legislative oppression. Madison wrote that, in a "representative republic where the executive magistracy is carefully limited," the greatest danger to the rights of the people comes from the "legislative power". THE FEDERALIST PAPERS 48 (Madison) (Clinton Rossiter ed. 1999).

Sounding the same theme, Hamilton invoked the specter of the national legislature enacting laws that infringe the rights of the people. He warned readers to beware of situations "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution." THE FEDERALIST PAPERS 78 (Hamilton). Hamilton responded to the charge of those opposed to ratification "that the legislative body are themselves the constitutional judges of their own powers" by noting that such an

interpretation "is not to be collected from any particular provisions in the Constitution." *Id.* To the contrary, the text of the Constitution provides that it is the "proper and peculiar province of the courts" to uphold the Constitution as "fundamental law." *Id.*

Hamilton emphasized the special role judges have in enforcing "specific exceptions to the legislative authority." In Hamilton's words:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Id.

Madison and the other Framers expressed in their statements and wrote into the Constitution's text that cases addressing the constitutionality of federal laws are squarely in the judiciary's domain. The text and history of Article III establish a judicial branch with the duty to play a vigorous role

in checking acts by the national legislature that infringe the rights of the people.

C. The Framers of the Bill of Rights Relied Upon the Availability of Article III Judicial Review.

The special role of the judiciary in reviewing congressional legislation that infringed the rights of the people was also essential to the passage of the Bill of Rights.

When Madison wrote to Thomas Jefferson on October 17, 1788, listing reasons both in favor of and against a Bill of Rights, he worried that "[t]he restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy." 11 THE PAPERS OF JAMES MADISON, 299 (William T. Hutchinson et al., eds. 1961). In response, Jefferson wrote on March 15, 1789, that "[i]n the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary." 12 PAPERS OF JAMES MADISON, at 13. Jefferson echoed what both Madison and Hamilton had previously highlighted in the *Federalist Papers*: the need for a judicial check against the legislative branch.

Jefferson viewed the availability of judicial review as a powerful reason to enact the Bill of Rights, so that the people would have an affirmation of their rights and liberties and a

means of enforcing these guarantees. His letter and its reasoning regarding the role of the courts "had a profound influence on Madison." LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 33 (1999).

When Madison proposed the Bill of Rights in Congress on June 8, 1789, he eloquently espoused the position suggested by Jefferson: that adoption of a Bill of Rights would enable the judiciary to protect the people from legislative tyranny. He also echoed Hamilton's argument in the *Federalist Papers* about the unique role of courts in enforcing "specified exceptions to the legislative authority." He stated:

> If the [Bill of Rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

Annals of Congress, 1st Cong., 1st Sess. 457 (1789). Madison steered the Bill of Rights to passage in order "to foster a consensus among Americans about the fundamental rights that defined their society and to institutionalize the judiciary as the guardian of those rights." Jones, 27 JOURNAL OF LAW AND POLITICS at 550.

The Framers expected the judicial branch to vigorously uphold the rights reserved to the people

in the Bill of Rights. Judicial review was the key to transforming rights from mere marks on paper to an effective shield guarding the people from a tyrannical government.

D. Court Precedent Supports Judicial Review of Respondents' Claims.

This Court's jurisprudence affirms the role of the judiciary in protecting against legislative overreaching and provides ample precedent to support review of the merits of Respondents' constitutional claims.

In the early period from 1789 to 1861, this Court "substantively evaluated the constitutionality of a federal statutory provision" in sixty-two cases, including five cases pre-dating *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1266-67, 1330 (Appendix of Cases) (2009). *Marbury* was notable in providing an "elaborate explanation" of the court's power to decide the constitutionality of federal law, but in the 19th Century, *Marbury* was viewed "as one case among others that took note of the principle that the judiciary could enforce constitutional limitations on legislatures." *Id.* at 1286, 1307.

M'Culloch v. Maryland, 17 U.S. 316, 423 (1819) provides the classic statement of both the need for, and the limits of, judicial review, emphasizing again the special role of the courts in enforcing acts "prohibited by the constitution":

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

Review of the constitutionality of federal laws by this Court increased following the Civil War. *See* Otis H. Stephens, Jr., *Marbury v. Madison: 200 Years of Judicial Review in America*, 71 TENN. L. REV. 241, 248 (2004). In the 20th Century and continuing to the present, this Court has repeatedly emphasized the judiciary's responsibility to review the constitutionality of federal laws in order to protect the rights of the people. *E.g.*, *Fairbank v. United States*, 181 U.S. 283, 286 (1901) ("This judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this nation."); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) ("The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."); *United States v. Munoz-*

Flores, 495 U.S. 385, 391 (1990) (emphasizing that "this Court has the duty to review the constitutionality of congressional enactments"). Just last Term, this Court cited *Marbury* as authority for the well-established principle that "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-28 (2012) (quoting *Marbury*, 5 U.S. at 177).

Just as in these earlier cases, Respondents' challenge to the constitutionality of the FAA is "of a Judiciary nature." Roberts, 42 DUKE L.J. at 1232. This Court observed in the Founding Era that resolving conflicts between federal statutes and the Constitution "is of the very essence of judicial duty." *Marbury*, 5 U.S. (1 Cranch) at 178. Chief Justice John Marshall explained: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Id.* at 177. As shown above, the Founding generation in America did indeed expect that unconstitutional laws would be invalidated by the federal courts. Judicial review of the FAA comports with the text and history of Article III.

II. The Particular Concerns of the First Amendment Support Standing In This Case.

The robust role of the judiciary envisioned in Article III is particularly strong in the context of the First Amendment. As this Court has recognized on many occasions, where First Amendment rights are at stake, an "actual and well-founded fear that the law will be enforced against them" is sufficient for plaintiffs to demonstrate injury sufficient to confer standing. *See Virginia v. American Booksellers' Ass'n*, 484 U.S. 383, 393 (1988); *see also Babbit v. American Farm Workers*, 442 U.S. 289, 298 (1979). This Court's precedents, sensitive to the Framers' understanding that the judiciary has a critical role to play in the protection of fundamental constitutional rights, support standing where, as here, plaintiffs must "take significant or costly compliance measures," *American Booksellers*, 484 U.S. at 392, to ensure their ability to speak freely and openly without the government listening in. *See* Brief of Resp. at 24, 29, 37, 43 (detailing costly and burdensome measures plaintiffs must take to protect their right to engage in confidential communications); *see also Meese v. Keene*, 481 U.S. 465, 475 (1987) (finding standing to challenge statute labeling film as "political propaganda" because of plaintiff's need to "take . . . affirmative steps to avoid risk of harm to his reputation").

The text of the First Amendment makes clear that the "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST.

amend. I. The government fundamentally misunderstands the First Amendment's text and history as well as this Court's precedents when it insists that Respondents show that they will certainly be surveilled under the law in order to challenge it. As Justice Alito recently explained, it is blackletter standing doctrine that "the injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Davis v. FEC*, 554 U.S. 724, 734 (2008). As the Court's standing cases repeatedly have recognized, First Amendment rights are vulnerable, largely due to potential chilling effects, and thus the mere existence of an infringing law can cause harm. Because "even minor punishments can chill protected speech," this Court "permit[s] facial challenges to statutes that burden expression." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). In the instant case, for example, attorneys credibly fear professional sanctions for unethical behavior if they engage in communications with their clients that are predictably likely to be subjected to warrantless surveillance by the federal government. *E.g.*, Br. of Resp. at 32-36. The government's accusations that Respondents' alleged harms are purely speculative are therefore particularly misplaced with respect to judicial review under the First Amendment.

Finally, the injury demonstrated by Respondents is plainly redressable. As this Court has explained: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in

legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). A judicial declaration that the FAA violates the First Amendment would redress Respondents' injury resulting from Congress's enactment of this Section. This remedy fully satisfies the redressability prong of the standing analysis. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). *See generally* Br. of Resp. at 48-53.

* * *

Marbury v. Madison proclaims that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. at 163. The text and history of Article III and the First Amendment support the conclusion that Respondents have amply demonstrated redressable injury sufficient to invoke judicial review of the constitutionality of the FAA.

CONCLUSION

The decision of the U.S. Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
ROCHELLE BOBROFF
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org
**Counsel of Record*

Counsel for Amicus Curiae

September 24, 2012

AMICUS CURIAE BRIEF

No. 11-1025

IN THE

Supreme Court of the United States

JAMES R. CLAPPER, JR.,
DIRECTOR OF NATIONAL INTELLIGENCE, *et al.*,
Petitioners,

v.

AMNESTY INTERNATIONAL USA, *et al.*,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC), THIRTY-TWO TECHNICAL EXPERTS AND LEGAL SCHOLARS, AND EIGHT PRIVACY AND TRANSPARENCY ORGANIZATIONS IN SUPPORT OF RESPONDENTS

MARC ROTENBERG
Counsel of Record
ALAN BUTLER
ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140

September 24, 2012

TABLE OF CONTENTS

TABLE OF CONTENTS i

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 9

ARGUMENT 9

I. The NSA's SIGINT Capabilities and Past Practices Support a Reasonable Belief That the Communications of United States Persons Will Be Intercepted 15

A. The NSA Has an Almost Boundless Capacity to Intercept Private Communications, Including Those of U.S. Persons 18

B. Current Technologies Developed by Intelligence Contractors and Other Agencies Show That the Government Is Capable of the Type of Broad Signal Collection That Respondents Allege 25

II. Without Adequate Public Reporting, Respondents' Apprehension That NSA Intercepts the Communications of U.S. Persons is Reasonable 29

A. The Wiretap Act Provides for Public Reporting That Details the Number of Persons Affected by Interception 30

B. The FAA Provides for No Public Reporting and Minimal Oversight of Collection on a Mass Scale 32

C. Increased Public Reporting and Oversight Would Enable Meaningful Review and an Evaluation of Costs and Benefits 36

CONCLUSION **39**

TABLE OF AUTHORITIES

CASES

Bennett v. Spear, 520 U.S. 154 (1997) 15

STATUTES

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197 9

18 U.S.C. § 2518(8)(d) 12

18 U.S.C. § 2519 ..... 9, 30

Foreign Intelligence Surveillance Act of 1978 ("FISA"), Pub. L. No. 95-511, 92 Stat. 1783 9

50 U.S.C. § 1806(c) 13

FISA Amendments Act of 2008 ("FAA"), Pub. L. No. 110-261, 122 Stat. 2463 10

50 U.S.C. § 1881a 10

50 U.S.C. § 1881a(a)-(b) 13

50 U.S.C. § 1881a(b) 10

50 U.S.C. § 1881a(d) 10

50 U.S.C. § 1881a(e) 10

50 U.S.C. § 1881a(g)(2)(A)(v) 10

ADMINISTRATIVE & LEGISLATIVE MATERIALS

Dep't of Homeland Sec., Privacy Impact Assessment for the Initiative Three Exercise, Mar. 18, 2012 ..... 27, 28

Edward C. Liu et. al., Cong. Research Serv., R42409, *Cybersecurity: Selected Legal Issues* (Mar. 14, 2012) 27, 28

Final Report of the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (Book II), S. Rep. No. 94-755 (1976) 18

Final Report of the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (Book III), S. Rep. No. 94-755 (1976) 19, 20, 21

H.R. Rep. No. 112-645, pt. 1, at 7 (2012) 35, 36

Hearing on the FISA Amendments Act of 2008: Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary (2012) (testimony and statement of Marc Rotenberg, Executive Director, EPIC) 30

Intelligence Activities – The National Security Agency and Fourth Amendment Rights: Hearing Before the S. Select Committee to Study Governmental Operations With Respect to Intelligence Activities (1975) (testimony of Lt. Gen. Lew Allen, Jr., Director, National Security Agency) 20

Letter from I. Charles McCullough III, Inspector General of the Intelligence Community, to Senators Ron Wyden and Mark Udall, Senate Select Committee on Intelligence (June 15, 2012) 13

Letter of Ronald Weich, Assistant Attorney General, U.S. Dep't of Justice to the Honorable Joseph R. Biden, Jr., President, United States Senate (Apr. 30, 2012) 33

Memorandum from President Harry S. Truman to Sec'y of State and Sec'y of Defense, *Communications Intelligence Activities* (Oct. 24, 1952) 18

Memorandum from Record, Armed Forces Security Agency, *SHAMROCK Operations* (Aug. 25, 1950) 20

National Security Agency, *Transition 2001* (Dec. 2000). 23

Office of the Dir. of Nat'l Intelligence, *U.S. National Intelligence: An Overview* (2011)14, 14, 16

Office of the Inspector General of the Dep't of Def. et al., *Unclassified Report on the President's Surveillance Program* (2009) 16

S. 3276, 112th Cong. §3 (2012)..... 36

The FISA Amendments Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 112th Cong. (2012) (statement of Chairman Sensenbrenner) 36

The USA PATRIOT Act in Practice: Shedding Light on the FISA Process: H. Before the S. Comm. on the Judiciary, 107th Cong. 37-38 (2002) 35

Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans' Privacy Rights (Part II): Hearing Before the H. Comm. on the Judiciary, 110th Cong. 79 (2007) (testimony of J. Michael McConnell, Dir. Of Nat'l Intelligence). 33

OTHER AUTHORITIES

Administrative Office of the United States Courts, *Wiretap Reports* 10

Barton Gellman, Dafna Linzer, & Carol D. Leonnig, *Surveillance Net Yields Few Suspects*, Washington Post, Feb. 5, 2006, at A01. 14

Bruce Schneier, *The Eternal Value of Privacy*, Wired (May 18, 2006) 12

Charles Fried & Gregory Fried, *Because It Is Wrong* (2010) 37

Comm. to Study Nat'l Cryptography Policy, Computer Sci. & Telecomms. Bd., Nat'l Research Council, *Cryptography's Role in Securing the Information Society* (Kenneth W. Dam & Herbert S. Lin eds., 1996) 12

Declaration of Mark Klein in Support of Plaintiffs' Motion for Partial Summary Judgment, Jewel v. NSA, No. 08-4373 (N.D. Cal. Jul. 2, 2012) 24

Declaration of Thomas A. Drake in Support of Plaintiffs' Motion for Partial Summary Judgment ¶ 8, *Jewel v. NSA*, No. 08-4373 (N.D. Cal. Jul. 2, 2012) 24

Declaration of William E. Binney in Support of Plaintiffs' Motion for Partial Summary Judgment ¶ 8, *Jewel v. NSA*, No. 08-4373 (N.D. Cal. Jul. 2, 2012) 24

EPIC, *Comments to Proposed Amended FISC Rules* (Oct. 4, 2010) 34

EPIC, *Foreign Intelligence Surveillance Act Orders 1979-2011* *34*

EPIC, *Wiretapping* 9

Eric Lichtblau & Scott Shane, *Bush is Pressed Over New Report on Surveillance*, N.Y. Times (May 12, 2006) 23

Eric Licthtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, Apr. 16, 2009 at A1 17

European Parliament: Temporary Committee on the ECHELON Interception System, *Report on the Existence of a Global System for the Interception of Private and Commercial Communications (ECHELON Interception System)*, 1 July 2001 21

General Michael Hayden, *Law, Policy, and the War on al-Qaida: An Emerging Consensus?*, Lecture from the Gerald R. Ford School of Public Policy (Sept. 7, 2012) 16, 17

George Brownell, *The Origin and Development of the National Security Agency* (1981) 16

Jack Goldsmith, *Power and Constraint* (2012) .. 37, 38

James Bamford, *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency* (1st ed. 2002) 22

James Bamford, *The NSA is Building the Country's Biggest Spy Center (Watch What You Say)*, Wired, Mar. 15, 2012 ..... 22, 23, 24

James Bamford, *The Puzzle Palace* (1982) 18

James Risen & Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. Times (Dec. 24, 2005) 22

Jennifer Valentino-Devries et al., *Document Trove Exposes Surveillance Methods*, Wall St. J. (Nov. 19, 2011) 25

Jesselyn Radack, *NSA's Cyber Overkill: A Project to Safeguard Governmental Computers, Run by the NSA, Is Too Big a Threat to Americans' Privacy*, L. A. Times, July 14, 2009 29

Julie Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stan. L. Rev. 1373 (2000) 12

Lawrence Wright, *The Spymaster*, The New Yorker (January 21, 2008) 19

Matthew M. Aid, *The Secret Sentry* (2009) 14

Samuel Alito, *The Boundaries of Privacy in America* (1972) ("Report of the Chairman") 30

TeleStrategies, *ISS World Americas 2012* *25*

U.S. Foreign Intelligence Surveillance Court, *Rules of Procedure*, Nov. 1, 2010 34

Wall Street Journal, *The Surveillance Catalog: OnPath Technologies – Notes* (2011) 26

Wall Street Journal, *The Surveillance Catalog: Telesoft Technologies* (2011) 26

Whitfield Diffie and Susan Landau, *Privacy on the Line* (2007) 12

William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 Tex. L. Rev. 1633 (2010) 11

INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.[1] The EPIC Advisory Board includes leading technical experts and legal scholars whose work has contributed to many of the techniques and policies that help safeguard privacy in the modern era.[2]

EPIC has participated as *amicus curiae* before this Court and many other courts in matters concerning the impact of electronic surveillance on civil liberties. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012); *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010); *Herring v. United States*, 555 U.S. 135 (2009); *Hiibel v. Sixth Judicial Circuit of Nev.*, 542 U.S. 177 (2004); *In re US for Historical Cell Site Data*, 747 F. Supp. 2d 827 (2010), *appeal docketed*,

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

[2] EPIC Fellows David Brody, Julia Horwitz, and Jeramie Scott contributed to this brief.

No. 11-20884 (5th Cir. Dec. 14, 2011). EPIC has also recently testified before Congress on the need for oversight in the FISA Amendments Act. *See Hearing on the FISA Amendments Act of 2008: Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary* (2012) (testimony and statement of Marc Rotenberg, Executive Director, EPIC).

This case presents the question of what showing is required to establish Article III standing to challenge the secret collection of private communications. The likelihood of injury depends in part upon the capacity of the Government to engage in the collection program described, and the willingness and authority granted to collect the type of communications at issue – the communications of United States persons. The Government's emphasis on targeting is unhelpful in addressing the standing issue, which relates to the potential interception and collection of Respondents' private communications.

The public's knowledge of the government's activity is limited, and its reasonable concern about the interception of communications is increased by the lack of public reporting and notification under the FISA Amendments Act. Without adequate reporting and accountability, there is insufficient assurance that the communications of U.S. persons will not be intercepted. The costs incurred by respondents to avoid disclosure of confidential communications are therefore reasonable in light of the government's surveillance capabilities and its failure to provide

adequate reporting of the use of its surveillance authority.

Technical Experts and Legal Scholars

Dr. Alessandro Acquisti, Associate Professor of Information Technology and Public Policy, Carnegie Mellon University

Steven Aftergood, Senior Research Analyst, Federation of American Scientists

Ross Anderson, Professor of Security Engineering, Cambridge University

James Bamford, Author and Journalist

Grayson Barber, Esq., Grayson Barber, LLC

Colin J. Bennett, Professor, University of Victoria

Julie E. Cohen, Professor of Law, Georgetown University Law Center

Simon Davies, Project Director, London School of Economics

Dr. Whitfield Diffie, Visiting Scholar, Stanford Center for International Security and Cooperation

Laura K. Donohue, Associate Professor of Law, Georgetown University Law Center

Cynthia Dwork, Researcher, Microsoft

David Farber, Distinguished Career Professor of Computer Science and Public Policy, School of Computer Science, Carnegie Mellon University

Addison Fischer, Former Owner, RSA Data Security, Co-Founder, Verisign

David H. Flaherty, Professor Emeritus of History and Law, University of Western Ontario; Information Privacy Commissioner for British Columbia, 1993-99

Philip S. Friedman, Friedman Law Offices, PLLC

Jerry Kang, Professor of Law, UCLA School of Law

Deborah Hurley, Chair, EPIC Board of Directors

Ian Kerr, Associate Professor, Canada Chair of Ethics, Law, and Technology, University of Ottawa

Chris Larsen, CEO and Co-Founder, Prosper Marketplace, Inc.

Rebecca MacKinnon, Schwartz Senior Fellow, New America Foundation

Mary Minow, Library Law Consultant

Pablo Molina, Adjunct Professor, Georgetown University

Dr. Peter G. Neumann, SRI International

Helen Nissenbaum, Professor, Media, Culture & Communication, NYU

Ray Ozzie, (former) Chief Software Architect, Microsoft

Dr. Deborah Peel, M.D., Founder and Chair, Patient Privacy Rights

Chip Pitts, Lecturer, Stanford Law School and Oxford University

Ronald L. Rivest, Professor of Electrical Engineering and Computer Science, MIT

Bruce Schneier, Security Technologist; Author, Schneier on Security (2008)

Barbara Simons, (former) IBM Research

Latanya Sweeny, Professor of Government and Technology in Residence, Harvard University

Frank M. Tuerkheimer, Professor of Law,
University of Wisconsin Law School

Privacy and Transparency Organizations

American Library Association

The American Library Association ("ALA"), established in 1876, is a nonprofit professional organization of more than 60,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

Bill of Rights Defense Committee

The Bill of Rights Defense Committee is a national non-profit grassroots organization. We defend the rule of law and rights and liberties challenged by overbroad national security and counter-terrorism policies.

Center for Financial Privacy and Human Rights

The Center for Financial Privacy and Human Rights was founded in 2005 to defend privacy, civil liberties and market economics. The Center was the first non-profit human rights and civil liberties organization whose core mission recognizes traditional economic rights as a necessary foundation for a broad understanding of human rights. CFPHR is part of the Liberty and Privacy Network, a

non-governmental advocacy and research 501(c)(3) organization.

Consumer Watchdog

Consumer Watchdog is a tax-exempt 501(c)(3) nonprofit organization dedicated to educating and advocating on behalf of consumers for over 25 years. Its mission is to provide an effective voice for the public interest. Consumer Watchdog's programs include health care reform, oversight of insurance rates, energy policy, protecting privacy rights, protecting legal rights, corporate reform, and political accountability.

OMB Watch

OMB Watch is a nonprofit research and advocacy organization in Washington, D.C., dedicated to providing citizens and activists with the information, tools, and opportunities they need to participate in the policymaking that directly affects their lives and communities. OMB Watch has particular interest in ensuring that federal information policy supports transparent and accountable government.

Privacy Activism

PrivacyActivism is a non-profit organization whose goal is to enable people to make well-informed decisions about the importance of privacy on both a personal and societal level.

Remar Sutton, Founder, Privacy Rights Now Coalition

Privacy Times

Since 1981, Privacy Times has provided its readers with accurate reporting, objective analysis and thoughtful insight into the events that shape the ongoing debate over privacy and Freedom of Information.

World Privacy Forum

The World Privacy Forum is a nonprofit, non-partisan 501(c)(3) public interest research group. The organization is focused on conducting in-depth research, analysis, and consumer education in the area of privacy.

SUMMARY OF THE ARGUMENT

The FISA Amendments Act of of 2008 ("FAA") permits the interception and collection of the private communications of U.S. persons who are suspected of no crime. This threat to privacy is especially acute given the capabilities of the National Security Agency ("NSA") and the absence of meaningful oversight. Where enormous surveillance capabilities and blanket secrecy coexist, the public may reasonably fear the interception and collection of private communications.

ARGUMENT

The rules and practices regarding electronic surveillance have changed substantially since the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, and the Foreign Intelligence Surveillance Act of 1978 ("FISA"), Pub. L. No. 95-511, 92 Stat. 1783. The federal Wiretap Act requires the government to report in detail on the use of electronic surveillance authority. 18 U.S.C. § 2519, which until 20003, accounted for the majority of court-approved wire surveillance. *See generally*, EPIC, *Wiretapping*;[3] Administrative Office of the United States Courts,

---

[3] *Available at* http://epic.org/privacy/wiretap/ (last accessed Sept. 20, 2012).

Wiretap Reports.[4] For thirty years the FISA required the government to provide specific, targeted requests aimed at agents of foreign powers and other non-U.S. persons before lawful surveillance was permissible.

The FISA Amendments Act of 2008 ("FAA"), Pub. L. No. 110-261, 122 Stat. 2463, replaced that system with one of broad authority with limited prohibitions on the interception and collection of communications involving U.S. persons. *See* FAA § 702 (codified at 50 U.S.C. § 1881a). The FAA, as adopted, 50 U.S.C. §§ 1881a *et seq*, expanded executive authority to conduct surveillance without particularized suspicion where a "significant purpose" is to obtain "foreign intelligence." § 1881a(g)(2)(A)(v). Such acquisitions are conducted subject to certain "targeting" and "minimization" procedures established by the Director of National Intelligence ("DNI") and the Attorney General, which are reviewed annually by the FISA Court of Review ("FISC"). *See* 50 U.S.C. § 1881a(d) and (e). There are a limitations to acquisition under the FAA.[5] However,

---

[4] *Available at* http://www.uscourts.gov/Statistics/WiretapReports.aspx.

[5] There are only five statutory limitations to acquisition under Section 702 of the FAA. The "acquisition" may not "intentionally target" any of the following: (1) a person "known at the time of acquisition to be located in the United States;" (2) a person "reasonably believed to be located outside the United States" if the purpose is to target "a particular, known person reasonably believed to be in the United States;" (3) a "United States person" believed to be located outside of the United States. 50 U.S.C. §

because the limitations are focused on "targeting" rather than collection, the limitations do not prevent broad collection of international and domestic communications, without significant judicial, legislative, or public oversight. This approach is commonly described as "programmatic surveillance." *See* William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 Tex. L. Rev. 1633 (2010).

Given the authorities established by the FAA, the capacity of the National Security Agency ("NSA") to collect domestic communications, and the lack of public understanding and reporting on the operation of FAA surveillance, it is reasonable for Respondents to believe that there is an imminent threat that their international communications will be intercepted. An expert panel of the National Academies found that the public's awareness of the government's capacity to monitor their private communications "is compounded by attempts to justify past incidents as having been required for purposes of national security. Such an approach both limits public scrutiny and vitiates policy-based protection of personal privacy." Comm. to Study Nat'l Cryptography Policy, Computer Sci. & Telecomms. Bd., Nat'l Research Council, *Cryptography's Role in*

1881a(b). The Government also may not "intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." *Id.*

Securing the Information Society (Kenneth W. Dam & Herbert S. Lin eds., 1996). "Privacy protects us from abuses by those in power, even if we're doing nothing wrong at the time of surveillance." Bruce Schneier, *The Eternal Value of Privacy*, Wired (May 18, 2006).[6] It is also important to consider the impact that monitoring has on other values, because "[a] realm of autonomous, unmonitored choice, in turn, promotes a vital diversity of speech and behavior." Julie Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stan. L. Rev. 1373, 1424 (2000).

The interception of private communications is difficult to detect. Unlike physical entry into a home or the seizure of private property, electronic surveillance routinely occurs without any noticeable disturbance to the target or to surveilled innocent bystanders. "It is inherent in telecommunication — and inseparable from its virtues — that the sender and receiver of a message have no way of telling who else may have recorded a copy." Whitfield Diffie and Susan Landau, *Privacy on the Line* 175 (2007). Federal wiretap law addressed this problem by establishing both public reporting requirements, 18 USC § 2519, and Government notification requirements, once an investigation is closed, to those who had been the subject of surveillance. 18

---

[6] *Available at* http://www.wired.com/politics/security/commentary/securitymatters/2006/05/70886.

U.S.C. § 2518(8)(d) (Wiretap Act notification provision); 50 U.S.C. § 1806(c) (FISA notification provision). These notification procedures help ensure accountability. However, subject notification has been eliminated under the FAA. By limiting reporting and eliminating the notification procedures that existed under previous wiretap law, the FAA has done much to undermine means of accountability.

In the absence of public reporting, similar to the annual reports provided for Title III wiretaps, the Respondents and others who engage in international communications may reasonably fear that their communications will be intercepted. The Inspector General of the Intelligence Community recently informed U.S. Senators that it is "beyond the capacity" of NSA to determine how many U.S. persons' communications the NSA has intercepted. Letter from I. Charles McCullough III, Inspector General of the Intelligence Community, to Senators Ron Wyden and Mark Udall, Senate Select Committee on Intelligence (June 15, 2012).[7]

The FAA limits the Attorney General and Director of National Intelligence's ability to "intentionally target" a U.S. person when acquiring intelligence information. See 50 U.S.C. § 1881a(a)-(b). However, this "intentional targeting" would occur after, not before, the collection of raw

---

[7] *Available at* http://www.wired.com/images_blogs/dangerroom/2012/06/IC-IG-Letter.pdf.

communications data.[8] The NSA has the capability to collect traffic from entire networks and infrastructures without "intentionally targeting" any particular person. "As of 1995, NSA was capable of intercepting the equivalent of the entire collection of the U.S. Library of Congress (one quadrillion bits of information) every three hours, and this figure has increased by several orders of magnitude since 9/11." Matthew M. Aid, *The Secret Sentry* 300 (2009). Thus, as part of a program of surveillance, the NSA could gather the raw data of all communications into or out of a particular point on the grid (be it a city, region, or country), and store it for later exploitation and analysis.[9]

---

[8] Some early estimates of the Presidential Surveillance Program indicated that thousands of U.S. citizens had "conversations recorded and read by intelligence analysis," but "[t]he program has touched many, many more Americans than that." Barton Gellman, Dafna Linzer, & Carol D. Leonnig, *Surveillance Net Yields Few Suspects*, Washington Post, Feb. 5, 2006, at A01. "Surveillance takes place in several stages, officials said, the earliest by machine. Computer-controlled systems collect and sift basic information about hundreds of thousands of faxes, e-mails and telephone calls into and out of the United States before selecting the ones for scrutiny by human ears." *Id.*

[9] This approach is exemplified in the official "consumer's guide" outlining how the intelligence community operates. Office of the Dir. of Nat'l Intelligence, *U.S. National Intelligence: An Overview* (2011) available at http://www.dni.gov/files/documents/IC_Consumers_Guide_2011.pdf. The guide says that "collection" of raw data occurs at the stage prior to the "processing and exploitation" stage. Id. at 11.

This Court has held that a party may have standing when the government operates a program that is likely to affect the party, even if the party has only a reasonable suspicion, "at the pleading stage," that the government program will target them specifically. *See Bennett v. Spear*, 520 U.S. 154, 167-68 (1997). Likewise in this case, without subject notification and public reporting to show whether or not the government is intercepting the communications of U.S. persons through its programmatic FAA surveillance, it is understandable that respondents are concerned that their communications would be swept up in the vast signals interception program.

I. The NSA's SIGINT Capabilities and Past Practices Support a Reasonable Belief That the Communications of United States Persons Will Be Intercepted

The Director of National Intelligence currently controls the enormous infrastructure of the U.S. Intelligence Community. Since its inception, the

---

"Exploitation" is defined as "[T]he process of obtaining intelligence from any source and taking advantage of it for intelligence purposes." Id. at 80. Thus, the mere collection of raw data would not constitute "obtaining intelligence" because that occurs at this later exploitation step. If intelligence is not obtained until raw data is exploited, then intentional targeting to acquire intelligence does not occur until after the raw data (e.g. electronic communications) have already been collected.

NSA's mission has been to provide its signals intelligence product ("SIGINT") to these agencies, including the Central Intelligence Agency, the Federal Bureau of Investigation, and the State Department. *See* George Brownell, *The Origin and Development of the National Security Agency* (1981).

The NSA is charged with providing "the technical expertise necessary to create" mass surveillance programs, like the recent "President's Surveillance Program" conducted from 2001-2007. Office of the Inspector General of the Dep't of Def. et al., *Unclassified Report on the President's Surveillance Program* 1 (2009). Thus, NSA coordinates with the seventeen other intelligence community organizations to obtain intelligence under the direction of the DNI. *See* Office of the Dir. of Nat'l Intelligence, *U.S. National Intelligence: An Overview* (2011).

This intelligence-gathering activity involved the collection of the communications of United States persons without a warrant, as described by former NSA Director Michael Hayden. In a recent speech, General Hayden discussed efforts to "dial things up a bit" in response to the attacks of September 11, 2001. General Michael Hayden, *Law, Policy, and the War on al-Qaida: An Emerging Consensus?*, Lecture from the Gerald R. Ford School of Public Policy (Sept. 7,

2012).[10] General Hayden discussed the 9/11 Commission's criticism that the NSA was too "timid" on the collection of certain communications that might be related to terrorist activities. "In other words communications [with] one end here – here in the United States." *Id.* The former NSA Director stated the President's authorization of increased intelligence gathering would result in a "higher probability you're going to intercept the communication, one end of which might be in the United States related to the al-Qaeda threat . . . ." *Id.*

The result was the warrantless wiretapping program that was first revealed in a New York Times expose, later described in an official Inspector General's Report, and eventually led to the enactment of the FAA. *See* Eric Licthtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, Apr. 16, 2009 at A1. As General Hayden said, "[t]he FISA Act not only legitimated everything President Bush had told me – almost everything President Bush had told me to do under his Article II authorities as commander-in-chief – but, in fact, gave the National Security Agency a great deal more authority to do these kinds of things . . . ." Hayden, *supra*.

The NSA has the ability to engage in broad collection of electronic messages, and the

---

[10] Transcript is available at http://www.fordschool.umich.edu/files/transcripts/2012-hayden-rosenthal.txt.

communications of U.S. persons are invariably swept up by the agency. This programmatic surveillance presents an imminent threat that the international communications of U.S. persons will be intercepted.

A. The NSA Has an Almost Boundless Capacity to Intercept Private Communications, Including Those of U.S. Persons

The National Security Agency has coordinated SIGINT activities since its inception in 1952,[11] and its interception network has grown to match the enormous volume of global communications. In 1975, Senator Frank Church warned that the NSA apparatus "at any time could be turned around on the American people and no American would have any privacy left, such is the capability to monitor everything: telephone conversations, telegrams, it doesn't matter." James Bamford, *The Puzzle Palace* 389 (1982) (quoting *Meet the Press* (NBC television broadcast Aug. 17, 1975). The NSA's intelligence-gathering infrastructure has grown exponentially

---

[11] *See* Memorandum from President Harry S. Truman to Sec'y of State and Sec'y of Defense, *Communications Intelligence Activities* (Oct. 24, 1952), *available at* http://www.nsa.gov/public_info/declass/truman.shtml.

since the Church Committee uncovered its domestic surveillance programs in the mid-1970s.[12]

The system of interception and collection as it currently exists likely incorporates the majority of traffic passing through United States telecommunications lines. Former Director Mike McConnell recently stated that eliminating "any telephone transmission or e-mail that incidentally flowed into U.S. computer systems" and other U.S. traffic would reduce the NSA's intercept capacity "by seventy per cent." Lawrence Wright, *The Spymaster*, The New Yorker (January 21, 2008). The result is collection of the private communications of U.S. persons, no matter how "incidental" to other targets. As Director McConnell noted in his discussion of the debates surrounding enactment of the FAA, "[n]aturally, some innocent Americans would be overhead . . . . What do you do about it?" *Id.* Both of these intelligence directors see collection of United States persons' communications as a natural, if unfortunate, result of the FAA system.

Previously, in the absence of meaningful oversight, the NSA routinely collected the private communications of U.S. persons. "[F]rom August 1945 to May 1975, NSA obtained copies of many international telegrams sent to, from, or through the United States from three telegraph companies." Final

---

[12] *See* Final Report of the S. Select Comm. to Study Gov't Op. with Respect to Intelligence Activities (Book II), S. Rep. No. 94-755 (1976).

Report of the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (Book III), S. Rep. No. 94-755 at 735 (1976) [hereinafter *Church Committee Report*]. In addition, the "NSA targeted the international communications of certain American citizens" from the 1960s through 1973. *Id.* Thus the NSA conducted domestic surveillance even though its mission "is directed to *foreign intelligence*. . . ." *Intelligence Activities – The National Security Agency and Fourth Amendment Rights: Hearing Before the S. Select Committee to Study Governmental Operations With Respect to Intelligence Activities* (1975) (testimony of Lt. Gen. Lew Allen, Jr., Director, National Security Agency).

Despite internal NSA policies and directives intended to limit the interception of U.S. persons' communications, such communications were in fact intercepted by the agency pursuant to three programs including "Operation SHAMROCK," and information derived from such communications was "disseminated by NSA to other intelligence agencies." Church Committee Report, *supra*, at 738. Through SHAMROCK the NSA gained access to "virtually all the international telegrams of Americans" carried by two of the three major telecommunications providers, and NSA analysis reviewed an estimated 150,000 messages per month in later years.[13] *Id.* at 740. The

---

[13] The collected messages were initially sorted manually, but the NSA transitioned to an "electronic sorting process" that allowed

companies hesitantly agreed to participate in this program after receiving repeated assurances from the Attorney General and the Secretary of Defense that their participation in the program was legal. *See* Memorandum from Record, Armed Forces Security Agency, *SHAMROCK Operations* (Aug. 25, 1950); Church Committee Report at 768-69.

The NSA quickly expanded its capability to intercept international communications beyond telegraphs to voice and other electronic communications. As early as 1970, the NSA "had access to international calls placed from, or received in, cities all over the United States that were switched through New York." Church Committee Report at 741. It used this access to assist the Bureau of Narcotics and Dangerous Drugs in monitoring select phone calls "between the United States and certain countries in South America," a function which the CIA later determined violated the National Security Act of 1947. *Id.*

More recently, the NSA collaborated with other intelligence organizations on a program known as "ECHELON," a data sharing agreement involving the UK, the USA, Canada, Australia and New Zealand ("UKUSA") for the purposes of intelligence interception. European Parliament: Temporary Committee on the ECHELON Interception System,

---

them to select particular communications based on key terms (like the name of the sender or recipient). Church Committee Report at 765.

Report on the Existence of a Global System for the Interception of Private and Commercial Communications (ECHELON Interception System), 1 July 2001.[14] While the NSA and its UKUSA intelligence partners had been exchanging intercepted communications since the beginning of their partnership in 1946, the development of ECHELON allowed the UKUSA partners to pool all of their signals intelligence data automatically. James Bamford, *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency*, 394-404 (1st ed. 2002). As a result, "agencies would be able to submit targets to one another's listening posts and, likewise, everyone would be allowed to share in the take – to dip their electronic ladles into the vast cauldron of intercepts and select what they liked." *Id* at 404.

The NSA is currently building a $2 billion data center in Buffdale, Utah that will encompass 1 million square feet. James Bamford, *The NSA is Building the Country's Biggest Spy Center (Watch What You Say)*, Wired, Mar. 15, 2012 [hereinafter *Bamford Wired Article*].[15] 100,000 square feet of the data center will be filled with servers. *Id.* With this type of capacity, the NSA could access and collect a majority of US-to-international telecommunications

---

[14] Available at: http://www.fas.org/irp/program/process/rapport_echelon_en.pdf.

[15] *Available at* http://www.wired.com/threatlevel/2012/03/ff_nsadatacenter/.

traffic. *See id.* Reports indicate that this has largely been accomplished through "backdoor access" via arrangements with "some of the nation's largest telecommunications companies." James Risen & Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. Times (Dec. 24, 2005). One senior NSA official even confirmed that in 2006 "the N.S.A. had access to records of most telephone calls in the United States" because in order to perform the types of traces they used "you'd have to have all the calls or most of them." Eric Lichtblau & Scott Shane, *Bush is Pressed Over New Report on Surveillance*, N.Y. Times (May 12, 2006).[16]

This NSA's SIGINT apparatus collects communications through a number of different channels: eavesdropping satellites that orbit the earth, secret monitoring rooms in U.S. telecom facilities, monitoring of satellite dishes in the US, and taps on overseas communication links. James Bamford, *The NSA is Building the Country's Biggest Spy Center (Watch What You Say)*, Wired, Mar. 15, 2012.[17] According to the agency, the nature of modern communications requires the NSA to "live on the network" in order to "perform both its offensive and defensive missions." National Security Agency,

---

[16] *Available at* http://www.nytimes.com/2006/05/12/washington/12nsa.html.

[17] *Available at* http://www.wired.com/threatlevel/2012/03/ff_nsadatacenter/.

Transition 2001 at 31 (Dec. 2000).[18] All this information can now be stored in one central location—the Utah Data Center.

According to James Bamford, the only thing stopping the NSA from complete access to all the collected information is encryption. *See id.* NSA is working on building the world's fastest supercomputer at its Oak Ridge, Tennessee facility, in order to break the encryption on the mounds of data it "currently collects". *Id.*

The routine collection and storage of domestic communications is a significant concern. Former telecommunications provider and NSA employees have noted that the NSA has installed intercept equipment at key junction points where domestic communication can be captured. *See Declaration of Mark Klein in Support of Plaintiffs' Motion for Partial Summary Judgment*, *Jewel v. NSA*, No. 08-4373 (N.D. Cal. Jul. 2, 2012); *Declaration of William E. Binney in Support of Plaintiffs' Motion for Partial Summary Judgment* ¶ 8, *Jewel v. NSA*, No. 08-4373 (N.D. Cal. Jul. 2, 2012) [hereinafter *Binney Decl.*].

The capabilities of the NSA go beyond the ability to capture and store massive amounts of data. As another former NSA employee points out, the "NSA has the capability to do individualized searches, similar to Google, for particular electronic

---

[18] *Available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB24/nsa25.pdf.

communications in real time through such criteria as target addresses, locations, countries and phone numbers, as well as watched-listed names, keywords, and phrases in email." *Declaration of Thomas A. Drake in Support of Plaintiffs' Motion for Partial Summary Judgment* ¶ 8, *Jewel v. NSA*, No. 08-4373 (N.D. Cal. Jul. 2, 2012) [hereinafter *Drake Decl.*]. Former NSA employees estimate that the agency is now collecting most if not all communications in U.S. and analyzing these communications later from static databases. *See Binney Decl.* ¶ 13-17; *Drake Decl.* ¶ 8-9.

B. Current Technologies Developed by Intelligence Contractors and Other Agencies Show That the Government Is Capable of the Type of Broad Signal Collection That Respondents Allege

The NSA has long depended upon technological development by private contractors and researchers. In addition to the traditional research and development model, a more direct market for surveillance technology has developed over the last 10 years into a $5 billion industry. Jennifer Valentino-Devries et al., *Document Trove Exposes Surveillance Methods*, Wall St. J. (Nov. 19, 2011). These technologies are showcased for U.S. Intelligence Agencies each year at the Intelligence Support Systems World conference held by

TeleStrategies. *See* TeleStrategies, *ISS World Americas 2012*.[19] More than 244 U.S. agencies, including the Office of the Director of National Intelligence, attended the 2011 surveillance technology conference. *See* Valentino-Devries, *supra*. Given the Government's access to and involvement in this market, the technologies showcased clearly represent a baseline of their surveillance capabilities.

The Wall Street Journal obtained documents from the 2011 surveillance conference, which provide insight into the capabilities of modern intelligence agencies such as the NSA and the CIA, as well as the FBI. This includes technology to enable massive interception of electronic communications, such as OnPath Technologies.[20] The Telesoft Technologies *Hinton 5000 Interceptor*, described in one of the brochures, can provide "the target or mass capture of 10s of thousands of simultaneous conversations from fixed or cellular networks for law enforcement or

---

[19] *Available at* http://www.issworldtraining.com/ISS_WASH/index.htm (last accessed Sept. 17, 2012).

[20] The CEO of OnPath, a New Jersey company, is quoted as saying "[w]e're allowing a whole new level of intelligence in the networks . . . . We can take a copy of everything coming through our switch and dump it off to the FBI." Wall Street Journal, *The Surveillance Catalog: OnPath Technologies – Notes* (2011), *available at* http://projects.wsj.com/surveillance-catalog/documents/267794-documents-266211-onpath-technologies-lawful/ (last accessed Sept. 17, 2012).

intelligence purposes." Wall Street Journal, *The Surveillance Catalog: Telesoft Technologies* (2011).[21]

In addition to off-the-shelf surveillance technologies, the NSA is developing new techniques to enable the interception of communications. For example, "EINSTEIN 3" filters Internet traffic around certain hubs and automatically reroutes information marked by a "threat signature" through an "Access Provider" for further analysis by a government agency. Dep't of Homeland Sec., Privacy Impact Assessment for the Initiative Three Exercise, Mar. 18, 2012.[22] The NSA developed EINSTEIN 3 to "identify and characterize malicious network traffic to enhance cybersecurity analysis, situational awareness and security response. It will have the ability to *automatically* detect and respond appropriately to cyber threats before harm is done." *Id* (emphasis added). The EINSTEIN software is able to make this kind of determination by analyzing the content of the emails and other electronic messages that are sent to or from government agencies., "EINSTEIN monitors not only federal executive agency employees' work e-mails or other official Internet activity, but also any information accessed

---

[21] *Available at* http://projects.wsj.com/surveillance-catalog/documents/267027-telesoft-technologies-hinton-5000-interceptor/#document/p1/a38601 (last accessed Sept. 17, 2012).

[22] Available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_nppd_initiative3exercise.pdf [accessed Sept. 17, 2012].

on a federal agency computer including personal e-mails accessed from sites such as Gmail or Hotmail, or other Internet communications such as Facebook and Twitter." Edward C. Liu et. al., Cong. Research Serv., R42409, *Cybersecurity: Selected Legal Issues* (Mar. 14, 2012).

In the lexicon of EINSTEIN 3's real-time full packet inspection, a "threat signature" is a designation given to a "pattern of network traffic" that has been identified by NSA as potentially compromising government information. Privacy Impact Assessment at 7. These signatures do not necessarily identity harmful traffic – they can identify either "known or suspected cyber threats." *Id.* For example, "a specific signature might identify a known computer virus," or "for example phishing, IP spoofing, botnets, denials of service, distributed denials of service, man-in-the-middle attacks, or the insertion of other types of malware." *Id.* at 4.

EINSTEIN 3 operates by automatically detecting these "threat signatures determined by NSA" and then rerouting the incoming information, along with an explanatory memo, to a special department within DHS where it is tagged with an "alert" and stored for review by analysts. *Id.* at 5.

This report reveals two important facts about NSA's capabilities. First, it reveals that NSA's technical competencies include a network rerouting system that can automatically scan, intercept, store, and subject to analytic scrutiny all emails going in and out of government computers that are tagged in a particular way. Liu at 15. Second, it reveals that

the communications of all federal employees – or of anyone using a federal government internet connection – are potentially subject to screening and analysis. This means that recipients of "tagged" communications could find their emails intercepted and blocked if, for example, they forwarded or replied to tagged messages. *Id.* at 17. As one expert has warned, "while earlier iterations of Einstein implemented signatures based on malicious computer codes, Einstein 3 could include signatures based on personally identifiable information. The privacy implications are great. Any citizen logging on to a ".gov" website would trigger this." Jesselyn Radack, *NSA's Cyber Overkill: A Project to Safeguard Governmental Computers, Run by the NSA, Is Too Big a Threat to Americans' Privacy,* L. A. Times, July 14, 2009.[23]

II. Without Adequate Public Reporting, Respondents' Apprehension That NSA Intercepts the Communications of U.S. Persons is Reasonable

The FAA grants broad surveillance authority with little oversight. Unlike the Wiretap Act, this statute does not contain substantive public reporting or notification provisions. Without such provisions, there is no public mechanism to ensure that the privacy of communications is ensured for United

---

[23] *Available at* http://articles.latimes.com/2009/jul/14/opinion/oe-radack14.

States persons. The need to establish effective oversight for government surveillance, including matters involving national security, is well understood and a long-standing concern. In 1971, a conference led by students at Princeton University highlighted the importance of standing for those "indirectly" effected by electronic surveillance to challenge the collection. *Boundaries of Privacy*, *infra*, at 35 ("Commission II - State & Local Gathering Data-Gathering Activities" at 2). "A Federal Court of Warrants should be created to issue warrants for electronic surveillance in all cases involving national security." Samuel Alito, *The Boundaries of Privacy in America* 5 (1972) ("Report of the Chairman"). The Report of the Chairman of that conference, Samuel Alito, recognized both that "the usual procedures [for electronic surveillance] may be inappropriate in cases involving the national security," and that the "system proposed by the government is highly susceptible to abuses." *Id.* Therefore the system requires specific oversight procedures to ensure that privacy rights are not violated.

A. The Wiretap Act Provides for Public Reporting That Details the Number of Persons Affected by Interception

Under provisions of the Wiretap Act, judges and the Attorney General must submit annual reports to the Administrative Office of the United States Courts detailing wiretap orders. 18 U.S.C. § 2519. These reports include the type of orders granted or denied, interception durations, offenses

under investigation, the frequency of incriminating and collateral interceptions, the number of persons affected, costs, and the number of resulting arrests, trials, and convictions. § 2519(1)-(2). The Administrative Office then reports this data to Congress. § 2519(3).

This report is likely the most comprehensive report on wiretap authority produced by any government agency in the world. *See Hearing on the FISA Amendments Act of 2008: Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary* (2012) (testimony and statement of Marc Rotenberg, Executive Director, EPIC). People might disagree over whether the federal government engages in too much or too little electronic surveillance, but this annual report provides a basis to evaluate the effectiveness of wiretap authority, to measure its cost, and even to determine what percentage of communications captured are relevant to an investigation.

These reports allow Congress and the public to evaluate the efficiency of government programs and ensure that civil rights are protected. Furthermore, such reports do not reveal sensitive information about particular investigations, but rather provide aggregate data about the government's surveillance activities.

B. The FAA Provides for No Public Reporting and Minimal Oversight of Collection on a Mass Scale

In contrast, the FAA lacks adequate public oversight. The public, the judiciary (but for the FISC) and almost all Members of Congress are kept in the dark as to the most extensive electronic surveillance program undertaken by the US government. While the DNI and Attorney General provide internal reporting requirements,[24] none of this information is made available to the whole Congress or the public broadly, and thus no meaningful public oversight can occur. In addition, the reports only relate to the application of "minimization" procedures, which are themselves inadequate to prevent the injury of collection. Director McConnell made clear before the FAA was passed that "minimization" occurs after the communications have already been collected.[25] *See Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans' Privacy Rights (Part II): Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 79 (2007) (testimony of J. Michael McConnell, Dir. Of Nat'l Intelligence).

---

[24] The Attorney General and DNI semi-annually report targeting and minimization procedural compliance to only the Foreign Intelligence Surveillance Court ("FISC"), congressional intelligence committees, and congressional judiciary committees. 50 U.S.C. § 1881a(l)(1). Each intelligence agency's inspector general submits similar semi-annual assessments. §

The Attorney General's annual FISA letter, which is the only publicly available document discussing the application of the law, provides little information about the use of FISA authority other than the total number of (1) FISA applications made to the FISC, (2) FISA requests for electronic surveillance, (3) FISA requests withdrawn, denied, or modified, and similar information about access to business records and National Security Letters. *See, e.g.*, Letter of Ronald Weich, Assistant Attorney General, U.S. Dep't of Justice to the Honorable Joseph R. Biden, Jr., President, United States Senate

---

1881a(l)(2). Agencies also conduct an annual review of FISA-authorized "acquisitions" and account for their impacts on domestic targets and American citizens. § 1881(a)(l)(3).

[25] This is exemplified by an exchange, which occurred during the hearing:

> REP. BERMAN: ... How do you minimize without knowing?
>
> MR. MCCONNELL: If you look at it, then you know.
>
> REP. BERMAN: So all you do is minimize the ones you happen to look at.
>
> MR. MCCONNELL: Right. If there is something in there that – it doesn't come up for some reason, you just wouldn't know ...

Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans' Privacy Rights (Part II): Hearing Before the H. Comm. on the Judiciary, 110th Cong. 79 (2007) (testimony of J. Michael McConnell, Dir. Of Nat'l Intelligence).

(Apr. 30, 2012) (2011 FISA Letter).[26] The letter does not even distinguish between traditional FISA orders and programmatic surveillance orders under the FAA.[27] There is no information about cost, purposes, effectiveness, or even the number of non-incriminating communications of U.S. persons the government collects. Under the new procedures that authorize programmatic surveillance without a specific target, it is almost impossible to assess and compare the aggregate numbers of individuals affected by interception since passage of the FAA.

Furthermore, the degree of oversight by the FISC is elusive at best. Often referred to as a secret court, the FISC rarely publishes any substantive information regarding the cases it hears; only a handful of written opinions have been released since the Court's inception.[28]. The only information currently available about the FISC on the U.S. Courts website is its adopted rules of procedure from November 2010. *See* U.S. Foreign Intelligence

---

[26] *Available at* http://www.fas.org/irp/agency/doj/fisa/2011rept.pdf.

[27] This is significant because while a traditional FISA order has a narrow scope, the number of communications impacted by an FAA order is essentially unbounded.

[28] It is clear from the Attorney General's annual reports that FISC applications are routinely approved with very rare exceptions. EPIC, *Foreign Intelligence Surveillance Act Orders 1979-2011*, http://epic.org/privacy/wiretap/stats/fisa_stats.html (last visited Sept. 20, 2012).

Surveillance Court, *Rules of Procedure*, Nov. 1, 2010.[29] *See also* EPIC, *Comments re Proposed Amended FISC Rules* (Oct. 4, 2010).[30]

In a prescient comment about proposed changes in FISA procedures a decade ago, Senator Patrick Leahy noted:

> We were talking about development of the secret body of laws without public scrutiny, and that is very unusual, not only in our democracy but any democracy. The Department is urging broader use of the FISA in criminal cases. And you are going to lose, ultimately lose public confidence both in the Department and in the courts, unless you can, by public reporting or otherwise show this is being used appropriately.

The USA PATRIOT Act in Practice: Shedding Light on the FISA Process: H. Before the S. Comm. on the Judiciary, 107th Cong. 37-38 (2002).

---

[29] *Available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/FISC2010.pdf

[30] http://epic.org/privacy/terrorism/fisa/EPIC%20Comments_FISC%202010%20Proposed%20Rules.pdf

C. Increased Public Reporting and Oversight Would Enable Meaningful Review and an Evaluation of Costs and Benefits

In the FAA reauthorization currently pending in Congress, proposed amendments to the FAA seek to address this lack of accountability by requiring enhanced inspector general scrutiny and unclassified, publicly available reports. Such public reporting would not only ensure greater accountability, it would also strengthen the executive's ability to protect national security.

For example, Representative Scott (D-VA) proposed an amendment that would require reviews under Section 702(l) of the FAA to be "provided in unclassified form," which would encourage public accountability for surveillance programs under Section 702. H.R. Rep. No. 112-645, pt. 1, at 7 (2012). Representatives Nadler (D-NY) and Schakowsky (D-Ill) proposed an amendment that would require the Attorney General to "make publicly available" unclassified summaries of FISC opinions that "includ[e] a significant construction or interpretation of section 702" and have been submitted to Congress. *Id.* at 6. Representative Jim Sensenbrenner (R-Wisc.) agreed at a recent FAA reauthorization hearing, noting that "perhaps decisions of the FISA Court, particularly review of the FISA court appropriately redacted, would be able to give us the answer . . . ." *The FISA Amendments Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland*

Security of the H. Comm. on the Judiciary, 112th Cong. (2012) (statement of Chairman Sensenbrenner).

The publication of FISC opinions regarding the legal interpretation of Section 702 would promote understanding of the system and limit any potential misconceptions based on the plain text of the FAA. The House of Representatives accepted neither of these amendments, and as a result the current FAA system lacks significant public oversight and accountability.

Senator Patrick Leahy has proposed amendments that would add public reporting and accountability procedures. *See, e.g.*, S. 3276, 112th Cong. §3 (2012) ("Leahy Amendment"). The amendment provides for a new review and public report to be issued by the Inspector General of the Intelligence Community, which would focus on the impact of FAA surveillance on the communications of U.S. persons. Such a report would clarify the effect of this law on the privacy of individuals in Respondents' position. The Senate has yet to act on the measure.

Former Assistant Attorney General Jack Goldsmith recently noted that, inspectors general are "an established, legitimate, and consequential mechanism of executive branch accountability." Jack Goldsmith, *Power and Constraint* 106 (2012). As Professor Goldsmith noted, "credible independent inspectors general inside the executive branch can enhance executive power." *Id.*

In order to maintain both security and privacy, the government requires complimentary tools that maximize efficiency. When the law gives new authority to conduct electronic surveillance, there should also be new means of oversight and accountability. The FISA Amendments Act fails this test. There is simply too little known about the operation of the FISA today to determine whether it is effective and whether the privacy interests of Americans are adequately protected. What is needed is what Professor Charles Fried has described as a "well-grounded degree of protection against arbitrary abuse of investigative power." Charles Fried & Gregory Fried, *Because It Is Wrong* 107 (2010).

Legal actions brought by parties seeking to safeguard electronic privacy, such as those of Respondents, form a vital part of our system of checks and balances. As Professor Goldsmith has noted, "[t]his is all very healthy for the presidency and for national security," because the continued efficacy of executive branch oversight "depends on just this type of skeptical attitude about its efficacy." Goldsmith, at 241. The ability of Respondents to have their claims heard is thus essential not only to protect privacy, but also to safeguard national security.

CONCLUSION

For the foregoing reasons EPIC respectfully asks this Court to uphold the decision of the Second Circuit below.

Respectfully submitted,

MARC ROTENBERG
ALAN BUTLER
ELECTRONIC PRIVACY
INFORMATION
CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
(202) 483-1248 (fax)
rotenberg@epic.org

September 24, 2012

AMICUS CURIAE BRIEF

REPRINTED COPY

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 24 2012
OFFICE OF THE CLERK

No. 11-1025

In the

Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL.,

Petitioners,

v.

AMNESTY INTERNATIONAL USA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FORMER CHURCH COMMITTEE MEMBERS AND STAFF AS *AMICI CURIAE* SUPPORTING RESPONDENTS AND AFFIRMANCE*

***See inside for list of amici**

EMILY BERMAN
Brooklyn Law School
250 Joraelmon Street
Brooklyn, NY 11201

JONATHAN HAFETZ
BARBARA MOSES
Seton Hall University School of Law
Center for Social Justice
833 McCarter Highway
Newark, NJ 07102
(973) 642-8700

SIDNEY S. ROSDEITCHER
Counsel of Record
THOMAS B. SULLIVAN
AUSTIN THOMPSON
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
srosdeitcher@paulweiss.com

September 24, 2012

Library of Congress
Law Library

LIST OF AMICI

Frederick D. Baron

Sen. Gary Hart (Ret.)

Dr. Loch K. Johnson

Hon. Paul Michel (Ret.)

Vice President Walter Mondale

Frederick A.O. Schwarz, Jr.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 8

I. FISA'S JUDICIAL SAFEGUARDS REFLECTED THE CHURCH COMMITTEE'S FINDINGS THAT ADEQUATE JUDICIAL REVIEW OF INDIVIDUAL SURVEILLANCE ACTIVITIES IS ESSENTIAL TO PROTECT CIVIL LIBERTIES 8

A. Before the Passage of FISA, United States Intelligence Agencies Routinely Engaged in Surveillance That Violated the Rights of American Citizens 11

B. Before the Passage of FISA, Intelligence Agencies Engaged in Warrantless Surveillance of American Citizens under the Pretext of Targeting Foreigners 14

C. The Church Committee Found That a Lack of Judicial and Congressional Oversight Allowed These Abuses to Occur 17

II. CONGRESS ENACTED FISA'S JUDICIAL SAFEGUARDS AS ESSENTIAL PROTECTIONS AGAINST THE SURVEILLANCE ABUSES FOUND BY THE CHURCH COMMITTEE TO INFRINGE THE CONSTITUTIONAL RIGHTS OF AMERICAN CITIZENS 19

III. THE FAA RAISES IMPORTANT CONSTITUTIONAL QUESTIONS BECAUSE IT AUTHORIZES MASS SURVEILLANCE THAT INCLUDES COMMUNICATIONS OF AMERICANS LOCATED IN THE UNITED STATES WITHOUT ANY OF FISA'S JUDICIAL SAFEGUARDS 23

A. The FAA Allows Mass Surveillance Without Requiring the Detailed, Individualized Showing Considered Necessary to Curb the Abuses of Executive Discretion Found By the Church Committee 25

B. The FAA Does Not Give the FISC Jurisdiction to Review in Advance Specific, Individual Surveillance Activities Involving Communications with American Citizens 27

C. The FAA Substitutes Executive Self-Regulation for FISA's Authorization of Ongoing Review by the FISC of Compliance With Minimization Procedures 29

IV. FISA'S JUDICIAL SAFEGUARDS ARE NEEDED NOW MORE THAN EVER TO PROTECT AMERICAN CITIZENS FROM THE KINDS OF UNCONSTITUTIONAL ABUSES FOUND BY THE CHURCH COMMITTEE 31

V. IF THESE RESPONDENTS ARE DENIED STANDING, IMPORTANT QUESTIONS CONCERNING THE CONSTITUTIONALITY OF THE FAA'S MASS SURVEILLANCE AUTHORITY ARE LIKELY TO ESCAPE JUDICIAL REVIEW ENTIRELY AND THE COURT'S ROLE IN THE CONSTITUTION'S SYSTEM OF CHECKS AND BALANCES WILL BE UNDERMINED 35

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

CASES

ACLU v. *NSA*,
493 F.3d 644 (6th Cir. 2007) 34

Amnesty Int'l USA v. *Clapper*,
638 F.3d 118 (2d Cir. 2011) 25, 30

Boumediene v. *Bush*,
553 U.S. 723 (2008) 34

Hamdi v. *Rumsfeld*,
542 U.S. 507 (2004) (plurality opinion) 34

United States v. *U.S. District Court* (*Keith*), 407 U.S. 297 (1972) 9, 27

STATUTORY MATERIALS

1 Annals of Cong. 439 8

124 Cong. Rec. 10887 27

124 Cong. Rec. 10889-90 20

Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1811). 5

50 U.S.C. § 1801 26

50 U.S.C. § 1803 20

50 U.S.C. § 1804 .....19, 20, 21, 21

50 U.S.C. § 1805 ..... 21, 22, 25

Foreign Intelligence Surveillance Act: Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 94th Cong. 28 (1976) 20

Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified at 50 U.S.C. § 1881a *et seq.*) 4

50 U.S.C. § 1881a ..... *passim*

Modernization of the Foreign Intelligence Surveillance Act: Hearing before the S. Select Comm. on Intelligence, 110th Cong., 1st Sess. (May 1, 2007).....33

S. Rep No. 95-604, *reprinted in* 1978 U.S.C.C.A.N. 3904 22

Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities and the Rights of Americans (Book II), S. Rep. No. 94-755 (1976) ("Church Committee Book II") ..... *passim*

Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities and the Rights of Americans (Book III), S. Rep. No. 94-755 (1976) ("Church Committee Book III")..... 13, 15, 16

OTHER AUTHORITIES

Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, April 15, 2009 32

Letter from Ron Wyden, U.S. Senator, et al., to James R. Clapper, Jr., Dir. of Nat'l Intelligence (July 26, 2012).....30

Offices of the Inspectors Gen. of the Dep't of Def., Dep't of Justice, Central Intelligence Agency, Nat'l Sec. Agency, & Office of the Dir. of Nat'l Intelligence, *Unclassified Report on the President's Surveillance Program* 1 (2009).....23

James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005 23

James Risen & Eric Lichtblau, *Extent of E-mail Surveillance Renews Concerns in Congress*, N.Y. Times, June 17, 2009.....32

James Risen & Eric Lichtblau, *Spying Program Snared U.S. Calls*, N.Y. Times, Dec. 20, 2005 32

INTEREST OF *AMICI CURIAE*[1]

Amici were members or staff of the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee" or "Committee"), formed in 1975 in response to decades of unethical and illegal conduct by United States intelligence agencies. The Church Committee's investigation led to the enactment of the Foreign Intelligence Surveillance Act, which contained a number of important safeguards against abuse of surveillance powers. *Amici* have an interest in ensuring that the lessons they learned during the Committee's investigation are not forgotten, including the need for judicial safeguards to protect American citizens and legal residents from violations of their First and Fourth Amendment rights.

Amicus Frederick D. Baron served as counsel on the Church Committee staff. As special assistant to the Attorney General of the United States (1977-79) with responsibility for foreign intelligence and counterintelligence matters, he was involved with drafting and legislative coordination of the Foreign Intelligence Surveillance Act of 1978. He later served as Associate Deputy Attorney General and

---

[1] This brief *amici curiae* is filed with the consent of all parties. Counsel for *Amici* affirm, pursuant to Supreme Court Rule 37.6, that no counsel for any party authored this brief in whole or in part, and that no party, counsel for any party, or any other person other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Director of the Executive Office for National Security of the Department of Justice (1995-1996); and as assistant United States attorney for the District of Columbia (1980-82).

Amicus Gary Hart, a United States Senator from Colorado from 1975 through 1987, was a member of the Church Committee. He served as a charter member of the Senate Intelligence Oversight Committee and was a member of the Senate Armed Services Committee. He was co-chair of the United States Commission on National Security for the 21st Century from 1998 through 2001 and currently serves as Chair of the Department of Defense's Threat Reduction Advisory Committee.

Amicus Loch K. Johnson served as the staff assistant or "designee" to Senator Church throughout the Church Committee inquiry. He subsequently served as staff director of the Oversight Subcommittee on the House Permanent Select Committee on Intelligence (1977-1980) and assistant to Chairman Les Aspin of the Aspin-Brown Commission of Intelligence (1995-1996). He is the author of a book about the Church Committee, entitled *A Season of Inquiry* (1987), and is currently senior editor of the international journal *Intelligence and National Security*. He is the Regents Professor of International Affairs at the University of Georgia.

Amicus Paul Michel was an assistant counsel on the Church Committee staff following service as a Watergate special prosecutor. Now retired, he was a judge and, from 2005 onward, Chief Judge, of the United States Court of Appeals for the Federal Circuit between 1988 and 2010, and by 2005

appointment of the Chief Justice, a member of the Executive Committee of the Judicial Conference of the United States, the governing body of the judiciary.

Amicus Walter Mondale, Vice President of the United States from 1977 through 1981 and a United States Senator from Minnesota from 1964 through 1976, was a member of the Church Committee and served as chairman of the subcommittee charged with drafting the Committee's final report on domestic intelligence activities. As Vice President, he was instrumental in facilitating the drafting and passage of the Foreign Intelligence Surveillance Act.

Amicus Frederick A.O. Schwarz, Jr. served as Chief Counsel to the Church Committee. After his work for the Committee, while back at his law firm, he worked as a part-time consultant for Vice President Mondale on issues such as the drafting of the Foreign Intelligence Surveillance Act. He is now Chief Counsel of the Brennan Center for Justice at New York University School of Law, a non-partisan public policy and law institute focused on fundamental issues of democracy and justice, including access to the courts and the limits of executive power in the fight against terrorism. He is the co-author of *Unchecked and Unbalanced: Presidential Power in a Time of Terror*.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Respondents and urge affirmance of the decision of the United States Court of Appeals for the Second Circuit, which found that Respondents have standing

to challenge the constitutionality of Section 702 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified at 50 U.S.C. § 1881a *et seq.*), ("FAA"). As the Court of Appeals found, Respondents have a reasonable fear that they will be electronically surveilled and have taken expensive steps, many of which are demanded by their ethical and professional responsibilities, to protect the privacy of their communications.

In this brief, *Amici* show that important constitutional questions would escape judicial review if the Court were to find that these Respondents lacked standing. Respondents challenge the FAA because it allows intelligence agencies to conduct surveillance without the judicial safeguards that Congress, based on the findings of the Church Committee, had considered essential to protect Americans from unlawful and unconstitutional executive abuses. Because the government treats as secret the identity of persons surveilled, if the Court determines that these Respondents do not have standing to bring this challenge, it is unlikely that any plaintiff in the future would have standing to bring such a challenge. As a result, the important constitutional questions raised by the FAA would escape judicial review entirely and the judiciary would be deprived of its role as a check against executive or legislative violations of constitutional rights.

Formed in 1975 in the wake of widespread abuses of authority by intelligence agencies, the Church Committee conducted an extensive

investigation of American surveillance operations. The Committee found that intelligence agencies, operating without sufficient oversight or monitoring, repeatedly ran roughshod over Americans' First and Fourth Amendment rights. From the 1930s through the 1970s, Democratic and Republican administrations alike wiretapped and bugged the homes and offices of American citizens without any judicial authorization. Moreover, surveillance purportedly motivated by national security concerns became politically driven.

The Church Committee concluded that without meaningful judicial review and monitoring of surveillance operations, surveillance can exceed constitutional and other legal restraints. In 1978, Congress agreed and enacted the Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1811) ("FISA"), to, among other things, provide judicial safeguards to protect Americans against the abuses found by the Church Committee. In particular, FISA required *ex ante* judicial review of applications for particularized surveillance orders and authorized *ex post* judicial monitoring of the government's compliance with the limits imposed by statute and by judicial orders.[2]

---

[2] Because the FAA enables the government to completely circumvent FISA's pre-FAA requirements where the government claims to be targeting a non-U.S. person outside the United States, this brief generally uses the past tense in referring to FISA. Outside the area covered by the FAA, FISA's pre-FAA requirements continue to apply.

For almost thirty years, FISA empowered the Foreign Intelligence Surveillance Court ("FISC"), a special court created by the Act, to prevent intelligence agencies from violating the rights of American citizens or using surveillance for political purposes, while permitting those agencies to obtain information needed to protect the United States. However, in the wake of the September 11, 2001 terrorist attacks, FISA's critical safeguards were first disregarded and then, with the passage of the FAA in 2008, effectively abandoned.

While ostensibly leaving FISA's structure intact, the FAA enacted "additional" procedures to authorize surveillance of non-United States persons outside of the United States, including their communications with American citizens in the United States. These procedures enable the government to circumvent entirely the original FISA protections deemed essential to the protection of Americans' basic rights. Notably, some of the most serious abuses discovered by the Church Committee involved the warrantless surveillance of American citizens under the pretext of targeting foreigners.

FISA required particularized and detailed applications to the FISC identifying specific, individual targets and facilities to be surveilled and permitted surveillance only upon a finding of probable cause for the belief that the targets were foreign powers or their agents and that they were using the targeted facilities. Under the FAA's new procedures, however, these limits have been discarded, allowing the executive to bypass FISA's requirements and engage in wholesale, blanket

surveillance without identifying any individual targets or facilities or requiring any showing of probable cause. Judicial review consists only of confirmation that the executive's application contains certain certifications and a determination that the surveillance program's targeting procedures and minimization procedures—procedures to minimize unnecessary collection, retention, and dissemination of collateral communications of American citizens and legal permanent residents—meet statutory and Fourth Amendment requirements.

Further, where FISA empowered the FISC to monitor authorized surveillance operations and enforce the law when the government overstepped applicable limits, the FAA removes this monitoring role, giving courts no authority to stop even blatant overreaching. Instead, it leaves monitoring of compliance with the permitted scope of authorized surveillance operations and minimization procedures essentially to self-regulation by the executive branch, despite the findings of the Church Committee that such self-regulation proved inadequate to prevent abuse.

The judicial safeguards originally enacted by FISA are even more necessary today than they were in 1978, given the expansion of executive surveillance activities, the evolution in communications technology, and the pressures on the executive to conduct surveillance to prevent terrorist attacks. As this Court has recognized, it is in precisely such times that adequate judicial safeguards are most needed as a check against

unconstitutional and other unlawful executive conduct. Yet the FAA now immunizes surveillance of Americans' communications into and out of the United States from meaningful judicial review.

Respondents' claims in this lawsuit thus raise questions as to whether electronic surveillance conducted without the safeguards enacted in response to the Church Committee's findings violate the First and Fourth Amendments. Denying Respondents standing to raise these important questions would effectively insulate the FAA from judicial review. *Amici* submit that such a result would subvert the judiciary's role as "guardians" of the Bill of Rights and as an "impenetrable bulwark" against abuses of power by the other branches of the government. See 1 Annals of Cong. 439 (remarks of James Madison in presenting the Bill of Rights to Congress).

ARGUMENT

I. FISA'S JUDICIAL SAFEGUARDS REFLECTED THE CHURCH COMMITTEE'S FINDINGS THAT ADEQUATE JUDICIAL REVIEW OF INDIVIDUAL SURVEILLANCE ACTIVITIES IS ESSENTIAL TO PROTECT CIVIL LIBERTIES

Without judicial oversight and monitoring, even the best-intentioned members of the United States intelligence community are virtually certain to exceed the proper boundaries of surveillance operations. As this Court recognized forty years ago, those charged with conducting such operations

"should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *United States* v. *U.S. District Court* (*Keith*), 407 U.S. 297, 317 (1972).

Keith held that the Fourth Amendment requires the government to obtain a judicial warrant in advance of conducting electronic surveillance for domestic security purposes. *Id.* at 324. The case did not present, and the Court left open, the question whether such a requirement also applied to surveillance of a foreign power. *See id.* at 322 n.20.

In 1975, the Senate formed the Church Committee, among other things, to address that gap and to investigate allegations of surveillance abuses more generally. *See* Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities and the Rights of Americans (Book II), S. Rep. No. 94-755 (1976), at v ("Church Committee Book II"). The Committee found a host of government misdeeds and recommended a lengthy series of changes to better ensure that Americans' privacy, expressive, and associational rights were protected. Among these recommendations were provisions, later enacted as part of FISA, requiring judicial oversight of intelligence operations—both before specific individual surveillance activities were initiated and while they were ongoing—to make sure

those operations were conducted within proper limits.

The Committee adopted its findings and recommendations on a bipartisan basis. Despite the Democrats' large Senate majority, the Committee membership was almost evenly divided: six Democrats and five Republicans. Senator John Tower, the senior Republican, was designated the Committee's Vice Chair, and he presided over Committee meetings when the Chairman, Democratic Senator Frank Church, was absent.

There was bipartisan support for the Book II Report on "Intelligence Activities and the Rights of Americans," which focused on non-military intelligence abuses and their impact on American citizens' rights. Three members, however—Senators Tower, Baker and Goldwater—issued separate statements disagreeing with various aspects of the report. But Senators Tower and Baker agreed with the extensive findings of intelligence abuses documented in the report and both agreed with the requirement for an advance judicial warrant for electronic surveillance. Senator Tower specifically emphasized support for "issuance of a judicial warrant as a condition precedent to electronic surveillance," a measure which "enjoys bi-partisan support in Congress." Senator Tower, Church Committee Book II at 371. Similarly, Senator Baker also expressed his "wholehearted[] support" for a bill requiring a warrant, noting "[t]he abuses of electronic surveillance of the past clearly dictate a need for a system of judicial warrant approval" and that the proposed new system "needs consolidated bi-

partisan support because it represents a significant advance from existing practice." *Id.* at 384.

A bipartisan spirit also characterized FISA's enactment. In the final debate over FISA in the Senate, for example, Senator Jake Garn, the Republican manager of the bill and Vice Chair of the Intelligence Committee, explained:

> [FISA's] sponsorship represents a unique bipartisan collaboration in the interests of national security. . . . This is not a liberal bill. It is not a conservative bill. It is neither a Democratic nor a Republican bill. The tasks of balancing cherished constitutional liberties with the increasingly threatened national security needs is too important to be left to partisanship." 124 Cong. Rec. 10888-89 (1978).

FISA was enacted by the Senate by a vote of 95-1 and in the House by a vote of 226-176. This was a resounding endorsement of the provisions for judicial oversight that were a centerpiece of FISA.

Such judicial oversight has been abandoned by the FAA.

A. Before the Passage of FISA, United States Intelligence Agencies Routinely Engaged in Surveillance That Violated the Rights of American Citizens

The Church Committee investigated the

activities of various United States agencies, including the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, the Department of Defense, and the National Security Council, from 1936 through 1976. Church Committee Book II at v-vii, 21. Looking back as far as the administration of Franklin Roosevelt, the Committee found that "intelligence excesses, at home and abroad have been found in every administration." *Id.* at viii. Many presidential administrations collaborated with intelligence agencies to break the law and overextend intelligence operations. *See id.* at v, viii.

The Committee found a pattern of intelligence investigations with vague or imprecisely defined mandates, providing intelligence officials enormous discretion with which to choose their surveillance targets. This broad discretion enabled surveillance of individuals and organizations that presented little or no threat to national security. Often, the targets of wiretapping were chosen based solely on domestic political considerations.

In one of the most notorious examples, the FBI targeted Dr. Martin Luther King, Jr., in an effort to "neutralize" him as a civil rights leader. *Id.* at 11 (internal quotation marks omitted). The FBI used "nearly every intelligence technique at [its] disposal," including electronic surveillance, to obtain information about the "private activities of Dr. King and his advisors" in order to "completely discredit" them. *Id.* (internal quotation marks and citation omitted). For example, the FBI mailed to Dr. King a recording from microphones hidden in his hotel

rooms in an effort to destroy Dr. King's marriage. *Id.* In another example, the FBI claimed to justify collecting extensive data on the nonviolent Southern Christian Leadership Conference and its members by labeling the organization a Black Nationalist "Hate Group." *Id.* at 213.

Between 1960 and 1972, the FBI, without seeking judicial approval and based on little or no individualized grounds of suspicion, subjected nearly thirty American citizens to electronic surveillance of their communications in an effort to determine the sources of leaks of classified information. Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities and the Rights of Americans (Book III), S. Rep. No. 94-755 (1976), at 321, 327 ("Church Committee Book III"). The choice of surveillance targets was predicated on attenuated suspicion or mere speculation: for instance, one subject was chosen because of his frequent contact with the White House and National Security Council and his attendance at the same church as a journalist who had written a story revealing information about the President's communications. *Id.* at 326. At least seven of the targets were journalists. *Id.* at 327. Not only were no warrants sought, but at least ten of the wiretaps were initiated without the prior written approval of the Attorney General, in violation of then-current agency policy. *Id.* While the wiretaps allowed the FBI to compile a significant amount of personal and political information about the targets, nothing in the Bureau's records indicated "that the wiretaps succeeded in identifying a single person who had leaked national security information." *Id.* at 327.

Information on Americans that was collected in these programs was often wholly irrelevant to the stated purpose of the surveillance order, but it was nonetheless recorded and then disseminated to senior administration officials. This had disturbing implications for separation of powers principles. *See* Church Committee Book II at 161-3. For example, as part of an investigation into "possibly unlawful attempts of representatives of a foreign country to influence congressional sugar quota legislation," a bug was planted in the hotel room of the chairman of the House Agriculture Committee. *Id.* at 200. The Church Committee found that while the "investigation was apparently initiated because of the Government's concern about future relations with the foreign country involved and the possibility of bribery, it [was] clear that the Kennedy Administration was politically interested in the outcome of the sugar quota legislation as well" and obtained "a great deal of potentially useful political information" from this and other surveillance. *Id.* at 200-01.

B. Before the Passage of FISA, Intelligence Agencies Engaged in Warrantless Surveillance of American Citizens under the Pretext of Targeting Foreigners

The Church Committee also found that intelligence agencies expanded international surveillance programs into the domestic sphere, and as a result they often collected information on American citizens and activist groups while describing their surveillance as "foreign." *See*

Church Committee Book II at 104-05.

Of particular relevance here, the Committee determined that in some instances electronic surveillance of foreigners actually had the "primary purpose of intercepting the communications of a particular American citizen with that target" as a way of circumventing "the generally more stringent requirements for surveillances of Americans." Church Committee Book III at 312-13. In at least one instance, the FBI "instituted an electronic surveillance of a foreign target for the *express* purpose of intercepting telephone conversations of an American citizen." Church Committee Book II at 120 (emphasis added).

NSA surveillance programs purportedly designed to target foreigners also swept up "countless" pieces of correspondence "between Americans in the United States and American or foreign parties abroad." *Id.* at 169. Indeed, the NSA defined foreign communications as any communication "where one terminal is outside the United States," opening the door to surveillance of terminals at the other end of the communication in the United States used by American citizens. *Id.* at 104. As a result, "for many years," the NSA intercepted the communications of American citizens without a warrant or any form of judicial review. *Id.*

For example, Operation SHAMROCK, an NSA program initially intended to review the telegrams of foreign targets, expanded to become the "largest governmental interception program affecting Americans." Church Committee Book III at 740. All of the major telegraph companies agreed to allow the

NSA access to all of their incoming and outgoing international telegrams, "including millions of the private communications of Americans." Church Committee Book II at 104. The CIA initiated similar programs to intercept cables and mail entering the United States. *Id.* at 58. In addition, because the CIA could use wiretaps and bugs to listen to *all* communications of their targets, American citizens with whom the foreign targets spoke were also overheard by intelligence agents. Church Committee Book III at 312.

Americans' fundamental rights were further compromised when the CIA and NSA shared information on American citizens that they had collected in their investigations of "foreign" targets with the FBI. *See* Church Committee Book II at 59. For example, in the 1950s, the CIA began supplying the FBI with information it had collected about American citizens, particularly letters "professing 'pro-Communist sympathies'" and information about U.S. peace groups going to Russia. *Id.* at 59. Government officials outside the intelligence community also made requests—which the NSA honored—for specific people, including American citizens, to be targeted for surveillance. *Id.* at 161-62. In one instance, in response to "the specific request of the Bureau of Narcotics and Dangerous Drugs," the NSA monitored thousands of telephone conversations on a telecommunications pipeline between New York City and South America. *Id.* at 162.

C. The Church Committee Found That a Lack of Judicial and Congressional Oversight Allowed These Abuses to Occur

The Church Committee concluded that this unethical and illegal conduct had occurred—and continued for decades—because intelligence agencies lacked "appropriate restraints, controls, and prohibitions on intelligence collection." Church Committee Book II at 171. As a result, "distinctions between legitimate targets of investigations and innocent citizens were forgotten" and "the Government's actions were never examined for their effects on the constitutional rights of Americans." *Id.*

The Committee identified three characteristics of United States intelligence that, unchecked, had led to violations of the rights of American citizens: (1) excessive concentration of power in the executive, which "contained the seeds of abuse"; (2) excessive secrecy that shielded "constitutional, legal and moral problems from the scrutiny of all three branches of government [and] from the American people themselves"; and (3) a general sense of lawlessness that pervaded the intelligence field, causing government officials to use national-security rationalizations as a pretext to evade statutory and constitutional limits on non-security related surveillance. *Id.* at 292. The result was a "vacuum cleaner" approach to intelligence gathering that included massive overreaches and clear violations of both statutory law and the Bill of Rights. *Id.* at 165.

In response to the violations unearthed in their investigation—and to address the underlying

causes of those violations—the Church Committee called for strong, permanent statutory restraints and oversight from "all branches of Government." *Id.* at 289. Such restraints, the Committee reasoned, were necessary to prevent intelligence agencies from repeating past wrongdoing. *Id.* The Committee concluded that absent "new and tighter controls" designed to reduce the discretion of intelligence agencies, intelligence practices "threaten[ed] to undermine our democratic society and fundamentally alter its nature." *Id.* at 1.

Moreover, the Committee predicted that as the Government's technological capabilities "relentlessly increase[d]," the potential for abuse would grow. *Id* at 289. Therefore, it urged Congress to fashion restraints that could not only cure past problems but also "anticipate and prevent the future misuse of technology." *Id.* These measures, it concluded, would prove particularly necessary in periods of heightened threats to national security. *Id.* The Committee warned that "in time of crisis, the Government will exercise its power . . . to the fullest extent." *Id.* The resulting "crescendo of improper intelligence activity" could be prevented only by cabining executive power before such a time of crisis. *See id.*

II. CONGRESS ENACTED FISA'S JUDICIAL SAFEGUARDS AS ESSENTIAL PROTECTIONS AGAINST THE SURVEILLANCE ABUSES FOUND BY THE CHURCH COMMITTEE TO INFRINGE THE CONSTITUTIONAL RIGHTS OF AMERICAN CITIZENS

The Church Committee determined that active oversight from the judicial branch was the appropriate means to guard against inappropriate surveillance of innocent citizens. Church Committee Book II at 309. Thus, it concluded, "there should be no electronic surveillance within the United States which is not subject to a judicial warrant procedure." *Id.* at 325. The Committee, therefore, recommended requiring intelligence agencies to obtain judicial approval to monitor communications to, from, or about Americans. *See, e.g., id.* at 308-309.

These recommendations were enacted into law as part of FISA. Reflecting the congressional consensus that electronic surveillance undertaken to collect intelligence for foreign intelligence purposes should require judicial approval, FISA set forth a comprehensive procedure through which, with limited exceptions, officials had to obtain a court order before engaging in any surveillance of communications to or from Americans located in the United States. 50 U.S.C. § 1804. As Senator Birch Bayh explained during the Senate floor debate on FISA, the Act was intended to "bring an end to the practice of electronic surveillance by the executive branch without a court order in the United States. It establishes standards for issuing court orders that

reconcile the interests of personal privacy and national security in a way that is fully consistent with the fundamental principles of the fourth amendment and due process of law." 124 Cong. Rec. 10889-90; *see also Foreign Intelligence Surveillance Act: Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 28, 29 (1976) (explanation of former Deputy Solicitor General Philip Lacovara that FISA's requirement of judicial involvement was necessary both because "the courts, from the earliest time, have been regarded as the bulwarks of liberty against executive excesses," and because executive branch officials would exercise greater self-restraint when forced "to think through the decision that they're making and to put it down on paper and to have to justify it to someone else").

One of the most significant components of FISA's scheme was the creation of the FISC, a special court that served as a check on executive surveillance activities. The government had to apply to the FISC for permission to conduct foreign intelligence surveillance in the United States, including surveillance of communications with American citizens into and out of the United States. 50 U.S.C. §§ 1803, 1804.

Under FISA's procedures, a federal officer seeking authorization to conduct electronic surveillance was required to make a detailed application in writing under oath to a judge of the FISC seeking permission to surveil a specific target. The target of the surveillance must have been either a foreign power or an agent of a foreign power, and

the application was required to identify the specific facilities or places used or about to be used by the foreign power or agent to which surveillance would be directed. *Id.* § 1804(a)(3).

Each application was required to include, *inter alia*, a detailed statement of the facts and circumstances providing: (1) the identity or a description of the specific target of the surveillance and the facilities to be surveilled; (2) the justification for the belief that the target was a foreign power or a foreign power's agent and that the power or agent was using or about to use the targeted facilities or places; (3) proposed minimization procedures; (4) the nature of the information sought and the type of communications or activities to be surveilled; (5) the means to effect surveillance, including whether physical entry was required; (6) the facts of all previous applications; and (7) the period of time for which the surveillance would be maintained. *Id.* § 1804(a)(1)-(9).

In reviewing an application, the FISC judge was required to make an independent determination regarding its sufficiency on a number of grounds. The judge was required to assess whether there was *probable cause* to believe that both the target of the electronic surveillance was a foreign power or its agent and that they were using or about to use each of the facilities or places at which the surveillance was directed. *Id.* § 1805(a). In making the probable cause determination, the judge was to look to "past activities of the target, as well as facts and circumstances relating to current or future activities of the target." *Id.* § 1805(b). If the judge found that

there was not probable cause, she could not authorize the requested surveillance. *Id.* § 1805(a).

The Act also required the judge to evaluate the application's plan for minimization procedures to limit the agency from collecting and retaining collateral information collected on Americans. *Id.* at § 1804(a)(4); S. Rep No. 95-604, at 37-38, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3939.

Not only were FISC judges required to make these independent *ex ante* determinations, but FISA also empowered the judge who authorized the surveillance to "assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated," at or before the end of the period during which surveillance was authorized. 50 U.S.C. § 1805(d)(3).

FISC judges also specified in their orders the permissible duration of the surveillance which, with certain limited exceptions, could be extended only if the government first submitted to the FISC for review and approval a new application containing all of the above details. *Id.* §§ 1805(d)(1), (d)(2).

III. THE FAA RAISES IMPORTANT CONSTITUTIONAL QUESTIONS BECAUSE IT AUTHORIZES MASS SURVEILLANCE THAT INCLUDES COMMUNICATIONS OF AMERICANS LOCATED IN THE UNITED STATES WITHOUT ANY OF FISA'S JUDICIAL SAFEGUARDS

FISA remained the law of the land, with updates, for almost 30 years. However, in the wake of the September 11, 2001 terrorist attacks, the President secretly authorized the NSA to conduct surveillance of communications between Americans and foreign parties without FISC authorization, under the President's claimed wartime powers. *See* Offices of the Inspectors Gen. of the Dep't of Def., Dep't of Justice, Central Intelligence Agency, Nat'l Sec. Agency, & Office of the Dir. of Nat'l Intelligence, *Unclassified Report on the President's Surveillance Program* 1, 11-12, 36 (2009) ("PSP Report"); James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1. This surveillance, known as the Terrorist Surveillance Program ("TSP"), was only one part of the still-secret President's Surveillance Program. The TSP itself remained secret until revealed in the press in 2005. *See* PSP Report, *supra*, at 1.

After first disregarding the law, the executive branch then sought to alter it. The Bush Administration worked with Congress to amend FISA three times before the FAA was enacted in 2008. The FAA, while leaving much of FISA intact, creates "Additional Procedures" for authorization of

foreign intelligence surveillance targeting non-United States persons located outside the United States.

These procedures enable the government to circumvent FISA's judicial safeguards, despite the Church Committee's finding that the claim that surveillance was intended to target foreigners was frequently a pretext for unlawful invasions of the privacy of American citizens. *See* pp. 14-16, *supra*.

The FAA abandons FISA's requirement that an individualized order issue after meaningful judicial review of the basis for the government's request. And it circumvents the FISC's power to engage in continued oversight of ongoing surveillance. Instead, the FAA permits the executive branch to initiate a generalized, mass surveillance program for up to one year, encompassing any communications entering or leaving the United States in which one or more unspecified targets are believed to be non-United States persons located outside the United States. In place of the detailed judicial review of the claimed justifications of individual surveillance activities, the FAA limits the FISC to a review that is perfunctory. The FISC does little more than ensure that the government's application recites the required statutory certifications and is designed to meet statutory and constitutional requirements for targeting and minimization procedures. Monitoring of the actual implementation of the minimization procedures is left to the executive branch. 50 U.S.C. § 1881a(a).

Thus, by authorizing mass surveillance and eliminating FISA's judicial safeguards, the FAA

immunizes individual, specific surveillance activities from judicial review.

A. The FAA Allows Mass Surveillance Without Requiring the Detailed, Individualized Showing Considered Necessary to Curb the Abuses of Executive Discretion Found By the Church Committee

One component of reform that the Church Committee advocated was to limit significantly the discretion of intelligence agencies. *See* p. 18, *supra*. Absent such limitations, the Committee concluded, the government came to disregard "distinctions between legitimate targets of investigations and innocent citizens," and the resulting surveillance "threaten[ed] to undermine our democratic society and fundamentally alter its nature." *See id*. One way in which this excessive discretion was addressed was by requiring the government to make specific, individualized, and detailed showings to the FISC before it could obtain a surveillance order. *See* pp. 20-22, *supra*.

As the Second Circuit recognized, however, the FAA replaces FISA's individualized surveillance authorization procedures with a "mass surveillance authorization," *Amnesty Int'l USA* v. *Clapper*, 638 F.3d 118, 124 (2d Cir. 2011), returning to the pre-Church Committee days of relatively unconstrained executive discretion and its concomitant risks to fundamental constitutional rights.

Under its new procedures, the FAA authorizes the Attorney General and the Director of National

Intelligence to apply for an order authorizing them to conduct surveillance "targeting" unspecified foreign persons located outside the United States for a period of up to one year.

In contrast to FISA, the application need not identify or describe the persons or facilities to be surveilled. *Compare* 50 U.S.C. § 1805(c)(1) *with id.* §§ 1881a(d)(1), (g)(4). Nor is the government required to make the showing required by FISA that the target is a foreign power or agent of a foreign power; instead, it must merely certify that "a significant purpose of the acquisition is to obtain foreign intelligence material" and that information will be obtained "from or with the assistance of an electronic communication service provider." *Id.* §§ 1881a(g)(4), (g)(2)(A)(v); *see also id.* § 1801(e)(2).

An FAA application also must comply with a handful of additional requirements. It must attest that adequate targeting and minimization procedures have been approved by the FISC, have been submitted to the FISC, or are being submitted to the FISC with the certification. *Id.* § 1881a(g)(2). It must affirm that the surveillance will not: (1) intentionally target any person known at the time of acquisition to be located in the United States; (2) target a person outside of the United States if the purpose is actually to target a particular, known person reasonably believed to be in the United States; (3) target a United States person known to be outside of the United States; or (4) intentionally acquire any communications whose sender and all intended recipients are known at the time of acquisition to be in the United States. The

certifications, however, do not prohibit surveillance of communications between the foreign targets and United States persons located in the United States.

The application also must state that the surveillance shall be conducted in a manner consistent with the Fourth Amendment of the United States. *Id.* §§ 1881a(b), (g)(2).

None of the FAA's requirements, however, adequately substitutes for the detailed information that was required by FISA and that allowed the FISC to ensure that there was probable cause for government surveillance aimed at individualized, specified targets and facilities.

B. The FAA Does Not Give the FISC Jurisdiction to Review in Advance Specific, Individual Surveillance Activities Involving Communications with American Citizens

In *Keith*, this Court wrote that "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." 407 U.S. at 318 (citation omitted). The Church Committee agreed, recognizing that requiring government officials to go before a judge and seek approval was the surest way to guard against abuses. *See* Church Committee Book II at 325. This principle was adopted into law in FISA. *See* 124 Cong. Rec. 10887 ("It is the courts, not the executive, that would ultimately rule on whether the surveillance should occur." (Statement of Sen. Kennedy)). Unlike FISA, the FAA does not require

the government to establish or the FISC to determine that probable cause exists in advance of specific, individualized surveillance of identified targets and facilities. The FAA provides jurisdiction only for an abstract, *a priori* examination of a plan to monitor unknown persons using unknown surveillance facilities.

Under the FAA, the FISC is only granted jurisdiction to (1) determine whether the certification submitted has all the required elements; (2) determine whether the targeting procedures are reasonably designed to ensure that the acquisition is limited to targeting persons reasonably believed to be located outside of the United States and prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and (3) ensure that the targeting and minimization procedures meet the statutory requirements and Fourth Amendment. 50 U.S.C. § 1881a(i)(2); *see id.* § 1881a(i)(3)(A) (stating that the court "shall enter an order approving the certification" if the certification contains the information required by the statute).

Moreover, if the FISC judge finds that the government's certification has failed to include all of the required elements, the government has 30 days to correct any deficiency, *id.* § 1881a(i)(3)(B), and may continue to acquire information during any appeal of a denial of its application, *id.* § 1881(i)(4)(B). Thus, a mass surveillance operation found by the FISC to violate the Fourth Amendment can continue—regardless of the severity of the

violation—until that finding is affirmed by the FISA Court of Review.

C. The FAA Substitutes Executive Self-Regulation for FISA's Authorization of Ongoing Review by the FISC of Compliance With Minimization Procedures

In his letter transmitting the second volume of the Church Committee's findings, Senator Church stated that the Committee's recommendations were "designed to place intelligence activities within the constitutional scheme for controlling government power." Church Committee Book II at iii. FISA's probable cause review by the FISC, discussed above, provided one such check by the judiciary. Another check is meaningful post-authorization monitoring.

The FAA bypasses FISA's provisions empowering FISC to monitor compliance with minimization procedures. Instead, the FAA relies on two self-assessments. First, the Attorney General and Director of National Intelligence are required to conduct a semi-annual review to assess compliance with targeting and minimization procedures and the limitations on targeting of United States persons. *Id.* § 1881a(l)(1). Second, the heads of each intelligence agency conducting an acquisition under the FAA are required to make an annual review "to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition," including, among other things, an accounting of disseminated intelligence reports containing a reference to United States persons, the number of targets later

determined to be located in the United States, and a description of procedures developed to assess the extent to which the acquisitions acquire the communications of United States persons. *Id.* § 1881a(l)(3). While these assessments are submitted to the judges of the FISC and to both houses of Congress's intelligence and judiciary committees, it is far from clear what utility they serve.

As the Second Circuit pointed out in its decision below, though the government claims that FISC judges may disapprove of minimization procedures in the future if they are shown to be ineffective, "the government has not asserted, and the statute does not clearly state, that the FISC may rely on these assessments to revoke earlier surveillance authorizations." *Amnesty Int'l*, 638 F.3d at 125. Moreover, there are no provisions in the FAA that permit the FISC to make its own, independent assessment of whether there has been compliance with the minimization procedures. The reports are also insufficient to allow Congress to monitor or guard against overreaching. In a letter sent to the Director of National Intelligence on July 26, 2012, thirteen senators, including members of both the Intelligence and Judiciary committees, wrote that they were "concerned that Congress and the public do not currently have a full understanding of the impact that [the FAA] has had on the privacy of law-abiding Americans," noting that the intelligence community had been unable "to identify the number of people located inside the United States whose communications may have been reviewed" under the FAA. *See* Letter from Ron Wyden, U.S. Senator, et

al., to James R. Clapper, Jr., Dir. of Nat'l Intelligence (July 26, 2012) at 1, *available at* http://www.wyden.senate.gov/download/letter-to-dni.

Thus, the FAA essentially leaves to the executive the monitoring of its own compliance with minimization procedures. This disregards the Church Committee's findings that such self-regulation was inadequate to prevent abuse. *See* pp. 17-18, *supra*.

* * *

In sum, the FAA disregards entirely the approach taken by Congress in enacting FISA based on lessons learned from the Church Committee. It immunizes from judicial scrutiny actual, specific, individual executive surveillance activities that involve communications with American citizens.

IV. FISA'S JUDICIAL SAFEGUARDS ARE NEEDED NOW MORE THAN EVER TO PROTECT AMERICAN CITIZENS FROM THE KINDS OF UNCONSTITUTIONAL ABUSES FOUND BY THE CHURCH COMMITTEE

The Church Committee recognized that the pressure of foreign or domestic crises can lead to systematic intelligence agency excesses, including "lawless and improper behavior, intervention in the democratic process, [and] overbroad intelligence targeting and collection," if procedures for reporting and review are not established and lines of authority are not clearly drawn. *See* Church Committee Book II at 266; *see* p. 18, *supra*. In the absence of effective

judicial oversight, intelligence agencies have, since the 9/11 crisis, repeatedly infringed the rights of American citizens.

For example, as part of the Bush Administration's Terrorism Surveillance Program, which purportedly was aimed solely at international communications, the NSA nonetheless engaged in warrantless surveillance of purely domestic communications, as a result of what the agency described as "technical glitches." James Risen & Eric Lichtblau, *Spying Program Snared U.S. Calls*, N.Y. Times, Dec. 20, 2005, at A1.

In 2009, after the passage of the FAA, the press reported that the NSA carried out "significant and systematic" overcollection of domestic communications, due in part to difficulties in distinguishing between intra-American communications and those taking place at least partly overseas. Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, April 15, 2009, at A1. The press later reported that the NSA may have gone beyond legal boundaries established by eight to ten separate court orders, meaning that millions of individual communications could have been improperly collected. James Risen & Eric Lichtblau, *Extent of E-mail Surveillance Renews Concerns in Congress*, N.Y. Times, June 17, 2009, at A1.

Some of these incidents seem to be the result of changing technology, illustrating that such changes heighten—not weaken—the importance of providing checks on the government's ability to mass-monitor communications. The Church

Committee recognized that as the government's technological capacity to conduct surveillance increases, so does the potential for abuse. *See* p. 18, *supra*. In the time since the Church Committee made its findings, technology has made surveillance easier while complicating enormously the task of determining which communications can be legally and constitutionally monitored: now, for instance, "a single communication can transit the world even if the two people communicating are only located a few miles apart." *Modernization of the Foreign Intelligence Surveillance Act: Hearing before the S. Select Comm. on Intelligence*, 110th Cong., 1st Sess., at 19 (May 1, 2007) (statement of Adm. J. Michael McConnell, Director of Nat'l Intelligence). The potential for error created by this increased technological complexity is compounded by the increasing importance of telecommunications in daily life, as, "[w]ith the explosion of new technologies, including social networking sites, smartphones and other mobile applications. . . . there are . . . many new risks to . . . privacy." *See* 157 Cong. Rec. S3054 (daily ed. May 17, 2011) (statement of Sen. Leahy). Mistakes—and abuses—in electronic surveillance are thus easier and potentially more costly than ever.

This overcollection has likely also resulted, in part, from the enormous pressures that the threat of global terrorism has put on the executive branch. Determined to combat this threat at all costs, both elected and appointed officials can all too easily tolerate abuses of core constitutional rights, including the unjustified surveillance of innocent American citizens and residents. This renders the

need for meaningful judicial safeguards even more urgent, a point the Church Committee explicitly made. *See* p. 18, *supra*. As Justice Kennedy observed: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene* v. *Bush*, 553 U.S. 723, 798 (2008); *see also Hamdi* v. *Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality opinion) ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.").

While the above-described incidents are uniformly troubling, the full extent of FAA surveillance is impossible to determine, given the government's refusal to release—or even allow to be litigated—details of its surveillance activities. *See, e.g.*, *ACLU* v. *NSA*, 493 F.3d 644, 653 (6th Cir. 2007) (holding that "plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence" regarding the NSA's conduct of warrantless surveillance under the TSP). And absent any provision for meaningful independent oversight of those activities, the intelligence community will have limited incentives to prevent recurrence of its overcollection errors.

unlikely that any other plaintiff will have standing.[3] As a result, the FAA procedures that immunize surveillance of such communications from judicial scrutiny will themselves be immunized from judicial review of their constitutionality. The preservation of liberty will be entirely reliant on the good intentions of members of the intelligence community. *See also* Respondents' Brief at 57-58.

Accordingly, while *Amici* recognize that the merits of the constitutional issues raised by Respondents are not before the Court, *Amici* submit that the resolution of the standing question has significant consequences for our constitutional system of separation of powers and checks and balances. Reversing the circuit court's judgment would make it unlikely that these substantial constitutional questions will ever be subject to judicial review. This result would undermine our system of separation of powers by ousting the judiciary from its traditional, constitutionally assigned role as a check on constitutional violations

---

[3] While a criminal defendant would be able to challenge the constitutionality of the FAA if the government attempted to introduce FAA-derived evidence at trial, as far as we can determine, the government has not done so in the four years that the FAA has been in effect. Moreover, to rely on the possibility that the government might do so in the future, would, in effect, mean that whether or when there would be judicial review of the FAA's constitutionality would be dependent on executive discretion. Meanwhile, many Americans might continue to be subjected to surveillance that may be unconstitutional. *Amici* submit that this is inconsistent with the Constitution's system of checks and balances.

V. IF THESE RESPONDENTS ARE DENIED STANDING, IMPORTANT QUESTIONS CONCERNING THE CONSTITUTIONALITY OF THE FAA'S MASS SURVEILLANCE AUTHORITY ARE LIKELY TO ESCAPE JUDICIAL REVIEW ENTIRELY AND THE COURT'S ROLE IN THE CONSTITUTION'S SYSTEM OF CHECKS AND BALANCES WILL BE UNDERMINED

The central question underlying this case is whether the FAA—which abandons long-standing safeguards and allows wholesale surveillance programs without any judicial oversight of individual, actual surveillance activities—is consistent with the First and Fourth Amendments. The Church Committee recognized that to be consistent with the "fundamental principles of American constitutional government," the government's power to conduct intelligence activities "must be checked and balanced." Church Committee Book II at v. "[T]he preservation of liberty requires the restraint of laws, and not simply the good intentions of men." *Id.*

If these Respondents lack standing, notwithstanding that the nature of their professional responsibilities makes their communications with foreign persons outside the United States particularly likely subjects of surveillance, it is

by the other branches.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

EMILY BERMAN
Brooklyn Law School
250 Joraelmon Street
Brooklyn, NY 11201

JONATHAN HAFETZ
BARBARA MOSES
Seton Hall University
School of Law
Center for Social
Justice
833 McCarter Highway
Newark, NJ 07102
(973) 642-8700

SIDNEY S. ROSDEITCHER
Counsel of Record
THOMAS B. SULLIVAN
AUSTIN THOMPSON
Paul, Weiss, Rifkind, Wharton &
Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
srosdeitcher@paulweiss.com

Counsel for Amici Curiae

September 24, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1025

IN THE
Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, *ET AL.*, *Petitioners*,

v.

AMNESTY INTERNATIONAL USA, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF *AMICUS CURIAE* OF GUN OWNERS FOUNDATION, GUN OWNERS OF AMERICA, INC., U.S. JUSTICE FOUNDATION, DOWNSIZE DC FOUNDATION, DOWNSIZEDC.ORG, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENTS

GARY G. KREEP
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
(760) 788-6624
Attorney for U.S. Justice Foundation

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

*Counsel of Record
September 24, 2012

Library of Congress
Law Library

TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of *Amici Curiae* 1

Summary of Argument 1

Argument

I. TO DETERMINE WHETHER RESPONDENTS HAVE STANDING, THE COURT MUST FIRST DETERMINE THE NATURE OF THE CONSTITUTIONAL RIGHTS ALLEGED TO HAVE BEEN VIOLATED 3

A. Both the District Court and Court of Appeals Focused on Injury in Fact, without Defining the Legally Protected Interest 3

B. Respondents Assume that the Fourth Amendment Right At Issue in this Case is a Right to Privacy 5

C. The Threshold Interest Protected by the Fourth Amendment is Property, Not Privacy 6

D. The Supreme Court Rejected the Government's "Incidental" Argument in U.S. v. Jones 9

E. Olmstead Incorrectly Denied the Existence of a Property Interest in Electronic Communications 10

II. THE QUESTION PRESENTED SHOULD BE EVALUATED IN TERMS OF WHETHER THE RESPONDENTS HAVE PRESENTED A CASE OR CONTROVERSY BASED ON THE TEXT OF ARTICLE III AND THE SEPARATION OF POWER STRUCTURE OF THE CONSTITUTION 13

A. Neither Petitioners Nor Respondents Offer a Textual or Structural Analysis of Article III Standing 13

B. The Constitution's Text and Structure Demonstrate This Court's Crucial Role in Defending the People's Constitution 14

C. Petitioners' Arguments Against Standing Disregard this Court's Intended Role 16

D. Fourth Amendment Rights Are Indispensable Freedoms which Can Only Be Protected by this Court 19

III. IT IS ILLEGITIMATE TO DENY STANDING IN ORDER TO INSULATE SENIOR GOVERNMENT OFFICIALS 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION
Article III, Section 2 14
Fourth Amendment . . . . . 2, *passim*

STATUTES
FISA Amendments Act of 2008 3

CASES
Brinegar v. United States, 338 U.S. 160 (1949) 18,19,22,24
Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765) 7
Ex Parte Jackson, 96 U.S. 727 (1878) 10
Dietz v. Doe, 935 P.2d 611 (Wash. 1997) 8
District of Columbia v. Heller, 554 U.S. 570 (2008) 11
Hedges v. Obama, 2012 U.S. Dist. LEXIS 130354 (S.D.N.Y. Sept. 12, 2012) 18
Katz v. United States, 389 U.S. 347 (1967) . . . 2,6,12
Lewis v. Casey, 518 U.S. 343 (1996) 22
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 5
Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959) 12
Olmstead v. United States, 277 U.S. 438 (1928) 10,11,12
Raines v. Byrd, 521 U.S. 811 (1997) 16
United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012) . . . . . 2, *passim*

MISCELLANEOUS

American Bar Association, Model Rules of Professional Conduct, Comment on Rule 1:6 Confidentiality of Information 8

N. Devins & M. Fitts, "The Triumph of Timing," GEORGETOWN L.J. 86:351 (1997-98) 17

Federalist No. 78, G. Carey & J. McClellan, The Federalist (1990) 14,15

W. Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II At Nuremberg, Germany, 1945-1946, Southern Methodist University Press (1954) 20,21

INTEREST OF *AMICI CURIAE*[1]

Amici curiae Gun Owners Foundation, U.S. Justice Foundation, Downsize DC Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc., and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4).

Amici curiae are educational organizations interested in the proper interpretation of the U.S. Constitution. Most of these *amici* have filed numerous *amicus curiae* briefs in prior litigation, including in cases before this Court. All of these *amici* submitted an *amicus curiae* brief to this Court in United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012).[2]

SUMMARY OF ARGUMENT

The court of appeals and the district court below purported to examine whether the Respondents have suffered an "injury in fact." Neither court examined the nature of the "legally protected interest" asserted as required under traditional standing analysis.

---

[1] It is hereby certified that the parties have consented to the filing of this brief and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] http://lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf.

Petitioners assume their interest to be a privacy one under a long line of cases since Katz v. United States. But the search and seizure of Respondents' international communications is best viewed as a violation of their exclusive property rights in their communications. The nature of Fourth Amendment law has changed significantly since this case was litigated and decided below, with this Court's decision earlier this year in United States v. Jones. Jones re-established the primacy of property principles in search and seizure cases. Using a property analysis, Respondents have a protectable property interest in their electronic communications as they do in their written communications. In Jones, even a modest violation of property right was a Fourth Amendment protected interest. Thus, because Respondents are not "targeted" by the Petitioners, Petitioners' contention that their search and seizure of Respondents' communications is only "incidental," would be unavailing.

Like any constitutional issue, however frequently litigated, analysis must begin, or at least end, with a search for the meaning of the constitutional text. There is little question that the framers invested this Court with a crucial role to limit usurpation of the people's rights under the Constitution by the other two departments of government. Petitioners' arguments based on selected standing cases seeking to persuade this court not to perform its structural role are not persuasive. As Justice Robert Jackson explained, Fourth Amendment rights "belong in the catalog of indispensable freedoms." Yet, those rights are some "of the most difficult to protect since the officers are

themselves the chief invaders, and there is no enforcement outside of court."

Lastly, an amicus curiae brief filed by six former Attorneys General urge the Court to block Respondents' access to the courthouse door in order to give another layer of protection to government officials from being sued for violations of the constitutional rights. The Attorneys General's unprecedented plea for immunity through standing suggest that there are alternative forums for Respondents to assert their rights — defense in criminal proceedings and Freedom of Information requests. Neither would be an adequate substitute for injunctive relief. The meaning of the Article III case and controversy text must not be constricted to insulate senior government officials from accountability for their actions.

ARGUMENT

I. TO DETERMINE WHETHER RESPONDENTS HAVE STANDING, THE COURT MUST FIRST DETERMINE THE NATURE OF THE CONSTITUTIONAL RIGHTS ALLEGED TO HAVE BEEN VIOLATED.

A. Both the District Court and Court of Appeals Focused on Injury in Fact, without Defining the Legally Protected Interest.

The district court below originally held that the Respondents (plaintiffs below) lacked standing to challenge the FISA Amendments Act of 2008 ("FAA"),

believing that "[t]his case turns on whether the plaintiffs have met the irreducible constitutional minimum of personal, particularized, concrete injury in fact without turning to the additional prudential aspects of standing."[3] The district court did not view Respondents' fear of being monitored or the professional and economic costs they incurred to avoid surveillance as sufficient to support standing. Thus, the district court granted summary judgment for Petitioners and dismissed the complaint without reaching the merits of the Respondents' claims.[4]

The court of appeals disagreed. Observing that the "government did not submit any evidence of its own [and] at oral argument[,] the government said it accepted the factual submissions of the plaintiffs as true for purposes of these motions."[5] The court of appeals concluded that the plaintiffs' allegations regarding the fear of surveillance, as well as the economic and professional costs reasonably incurred to protect their international communications, constituted "injury in fact" sufficient to support standing.[6]

In their decisions, both district court and the court of appeals purported to follow a practice established in

---

[3] Amnesty Int'l v. Clapper, 646 F.Supp.2d 633, 643-44 (D.D.C. 2009) ("Amnesty I").

[4] *Id.* at 658.

[5] Amnesty Int'l v. James Clapper, 638 F.3d 118, 129 (2d Cir. 2011) ("Amnesty II").

[6] *Id.*, pp. 129-31.

a long line of standing cases to first determine whether a plaintiff has suffered an "injury in fact" — generally defined as "an invasion of a **legally protected interest** which is ... concrete and particularized ... and ... 'actual or imminent, not 'conjectural' or 'hypothetical....'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (emphasis added). However, both courts omitted any exposition of the "legally protected interest" involved. Identification of the specific constitutional right at issue in the case is a necessary prerequisite to determining if a plaintiff has suffered "injury in fact."

B. Respondents Assume that the Fourth Amendment Right At Issue in this Case is a Right to Privacy.

Respondents advance two theories of standing in this case. First, they argue that, due to the "substantial risk" that their communications may be intercepted, they have had to "take costly and burdensome measures to protect" themselves, which constitutes a concrete harm. Respondents Brief ("Resp. Br."), p. 24. Second, Respondents argue that there is a "threat of imminent surveillance" which "constitutes a cognizable injury...." *Id.*, p. 25. Both of these theories of harm appear to be premised on the argument that "[c]itizens and residents of the United States have a constitutionally protected **privacy interest** in the content of their telephone calls and e-mails." *See* Respondents' "Memorandum in Support of Motion for Summary Judgment," p. 17 (emphasis added). Respondents described the interest protected by the Fourth Amendment as privacy, following principles

established 45 years ago by this Court in Katz v. United States, 389 U.S. 347 (1967).

Petitioners never discuss the nature of the right asserted by Respondents, but rather repeatedly focus on the absence of an **intentional** search or seizure, and repeatedly downplay the **inevitable** intrusion into Americans' Fourth Amendment rights as "**incidental**" to the non-U.S. persons who are the primary targets of electronic surveillance. *See* Brief of Petitioners ("Pet. Br."), pp. 4, 7, 9, 10, 18, 19, 21, 23, 24, 29, 30, 33, 37, 39, 40; *see also* Petition for Certiorari, pp. 16, 18, 20, 23.

Petitioners never identify Respondents's rights as privacy, but their repeated discussion of incidental intrusion indicates they did not view Respondents as having a property right. Certainly neither party addressed the property interest that the Fourth Amendment was foremost designed to protect.

C. The Threshold Interest Protected by the Fourth Amendment is Property, Not Privacy.

The FAA challenge below was filed after FAA was signed into law on July 10, 2008, the district court's opinion was issued on August 20, 2009, and the court of appeals decision came on March 21, 2011 — all well before this Court's January 23, 2012 decision in United States v. Jones, *supra*. As such, it is not surprising that the shift in Fourth Amendment law occasioned by Jones has played no part in the litigation of this case to this point.

In Jones, the government attached a GPS tracking device to Mr. Jones' vehicle and used it to track him for a prolonged period without a warrant. This Court found the placement of the device on the car was a search, and made it clear that whatever privacy interest might be protected by the Fourth Amendment, the threshold interest is one of property, and it is the property issue which must be addressed first. This primacy of property is dictated by (i) the historic tie of search and seizure law to the protection of property rights, (ii) the text of the Fourth Amendment, and (iii) this Court's holding in Jones.

First, as Justice Scalia explained, the intended property basis for the Fourth Amendment was illustrated by a case considered to be "'the true and ultimate expression of constitutional law' with regard to search and seizure" — Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765) — where for purpose of search and seizure analysis, a man was declared to be "a trespasser, though he does no damage at all...." Jones, *supra*, p. 949.

Second, the constitutional text reinforced the property foundation of the Fourth Amendment:

> The text of the Fourth Amendment reflects its close connection to **property**, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their **persons, houses, papers, and effects**" would have been superfluous. [*Id.* (emphasis added).]

Lastly, Justice Scalia never applied an "expectation of privacy" test in the Jones case, having concluded that "Jones' Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Id.*, p. 950. The lesson from Jones is that if a property right has been violated, the court's analysis can begin and end with the property analysis.

Applying a property analysis to this case, the attorney Respondents alleged a property interest in their confidential communications with clients. Lawyers are not only entitled to participate in obtaining such confidential communications, but are ethically obligated to maintain possession of those communications, whether written down or committed to memory, to the exclusion of all others.[7] A lawyer's duty of confidentiality can even extend to the identity of his client.[8] A lawyer's interest, therefore, is fundamentally a property interest in protecting communications with a client.

Likewise, the Respondent journalists have a possessory interest in their communications with others. The information journalists collect is generally later packaged and sold. A journalist often must protect the identity of a confidential informer. Unless

---

[7] *See generally*, American Bar Association, Model Rules of Professional Conduct, Comment on Rule 1:6 Confidentiality of Information. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html.

[8] *See, e.g.*, Dietz v. Doe, 935 P.2d 611 (Wash. 1997).

such information is maintained exclusively until a journalist chooses to publish that information, and unless promised confidences are kept, the journalist cannot perform his function as a member of the fourth estate. His very livelihood depends upon his ownership of information he collects, and the cultivation and earned trust of confidential sources. Like the lawyer's interest then, the journalist's interest is best understood as a proprietary interest in his communications with others.

D. The Supreme Court Rejected the Government's "Incidental" Argument in U.S. v. Jones.

Petitioners repeatedly claim that any interception of Respondents' electronic communications would be "incidental." While such an argument may have a role in a jurisprudential Fourth Amendment privacy analysis, it has no place in a Fourth Amendment property analysis.

In Jones, *supra*, the government argued that there had been no Fourth Amendment violation because "**at most**, [the placement of the GPS tracking device] involved a **technical trespass**" or a "**modest ... intrusion**" onto Jones' property, as if the property interest there was merely incidental. Petitioner's Brief in U.S. v. Jones, pp. 15-16 (emphasis added). But a majority of the Court "rejected the argument that although a 'seizure' had occurred 'in a 'technical' sense' ... no Fourth Amendment violation occurred...." Jones, 132 S.Ct. at 951 (citations omitted).

Because Respondents have a property right to the electronic communications they send over a wire, just as real as their property right in a letter they send through the mail,[9] the government's warrantless search or seizure of that communication is material, regardless of whether it was intentional or incidental.

E. Olmstead Incorrectly Denied the Existence of a Property Interest in Electronic Communications.

In the majority opinion in Jones, Justice Scalia noted that "[t]he concurrence faults our approach for 'present[ing] particularly vexing problems' **in cases that do not involve physical contact**, such as those that involve the transmission of electronic signals." *Id.*, 132 S.Ct. at 953. Justice Sotomayor too, noted that "[i]n cases of **electronic** or other novel modes of surveillance that do **not** depend upon a **physical invasion** on property, the majority opinion's trespassory test may provide little guidance." *Id.* at 955 (emphasis added). Both opinions seemed to assume the holding of the overruled Olmstead opinion that "electronic signals" are not property. As a result, the majority abandoned exclusive reliance on property principles, believing them insufficient to protect

---

[9] *See, e.g.*, Ex Parte Jackson, 96 U.S. 727, 733 (1878) ("No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.").

against electronic surveillance, and believing that only the Katz ideas of privacy could govern in such situations. *Id.* at 954.

In Olmstead v. United States, 277 U.S. 438 (1928), this Court held that the use of wiretaps to intercept telephone conversations did not constitute a Fourth search or seizure because "[t]here was no [physical] entry of the houses or offices of the defendants." *Id.* at 464. The Court based this holding on the erroneous premise that a Fourth Amendment search must be "of **material things**...." *Id.* (emphasis added). Thus, while a physical message in the mail "is a paper," nonphysical messages "passing over ... the wires beyond [one's] house ... are not...." *Id.* at 466.

In reaching this conclusion, the Court ignored one of the most basic principles of interpreting constitutional law — that its protections are not limited to instrumentalities that existed during the founding era, but also their modern day analogues. For example, in District of Columbia v. Heller, 554 U.S. 570 (2008), Justice Scalia explained that:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects **modern forms of communications**, e.g., Reno v. ACLU, ... and the Fourth Amendment applies to **modern forms of search**, e.g., Kyllo v. United States, ... the Second Amendment extends, prima facie,

> to all instruments that constitute **bearable arms**, even those that were not in existence at the time of the founding. [*Id.* at 582 (emphasis added).]

Indeed, writing in dissent in Olmstead, Justice Holmes noted that "[c]lauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world." Olmstead at 472 (Holmes, J., dissenting).[10]

While the Katz Court overruled Olmstead, it did not reject Olmstead based on property principles, but based on the newly-created "reasonable expectation of privacy." Katz could have been decided on property grounds, since Mr. Katz presumably had paid for his call by putting coins into a public pay phone, thereby renting the equipment and therefore acquiring a leasehold interest in the phone booth as well the phone lines over which his call was placed. Erroneously rejecting the application of property principles to electronic communications, the Katz Court instead began a public policy fascination with a "right to privacy" that was not fundamentally re-examined and modified until 45 years later in U.S. v. Jones.

---

[10] Some courts have modernized their view of property rights and the law of trespass. *See, e.g.*, Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959) ("[W]e may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.").

By its decision in Jones, this Court has restored the property principle to its original provenance in its Fourth Amendment jurisprudence. Consequently, Respondents' legally protected interest is best understood not as a mere interest in privacy, but as a right to exclusive possession of their proprietary interest in their business communications. Thus, they have standing regardless of whether their communications were "targeted" or only "incidentally collected." Both actions trespass upon Respondents' right to exclude others from interfering with their possessory interests.

II. THE QUESTION PRESENTED SHOULD BE EVALUATED IN TERMS OF WHETHER THE RESPONDENTS HAVE PRESENTED A CASE OR CONTROVERSY BASED ON THE TEXT OF ARTICLE III AND THE SEPARATION OF POWER STRUCTURE OF THE CONSTITUTION.

A. Neither Petitioners Nor Respondents Offer a Textual or Structural Analysis of Article III Standing.

Neither Petitioners nor Respondents analyze the standing issue according to the constitutional text. Petitioners refer frequently to "Article III standing," "Article III injury in fact," "Article III jurisdiction," and "Article III purposes" (*e.g.*, Pet. Br., p. 10, 24), and limit themselves to a discussion of selected Supreme Court cases. While Petitioners seek to avoid review by this Court, asserting the prerogatives of the Executive Branch, they do not explain the constitutional

underpinnings of their argument. Respondents use similar phrases, sometimes making an argument based on what Article III does not require. *E.g.*, Resp. Br., p. 26. Each party's analysis is limited to the holdings of prior cases. While the principles of standing have been explored in many cases and many contexts, it would be a mistake to fail to begin the standing analysis in this case with the constitutional text, or at least return to the text to check the veracity of a decision wholly based on decided cases.

B. The Constitution's Text and Structure Demonstrate This Court's Crucial Role in Defending the People's Constitution.

Each of the first three Articles spells out the authority of each of the three branches of government, establishing a federal government of separated and distinct powers. Article III was carefully crafted to identify the scope of federal court jurisdiction within the tripartite structure of this federal government. In relevant part, Article III provides:

> The judicial power shall extend to all **cases**, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made ... under their authority; ... --to **controversies** to which the United States shall be a party.... [Article III, Section 2 (emphasis added).]

In the first essay on the judicial power in The Federalist Papers, Alexander Hamilton famously described the role of the judiciary has having "neither

Force nor Will, but merely judgment ... beyond comparison the weakest of the three departments of power..." Federalist No. 78, G. Carey & J. McClellan, The Federalist (1990), p. 402. Nevertheless, Hamilton identified the role of the judiciary to be a crucial defender of the people's constitution against legislative encroachment, the guardian of the limits placed by the people on the departments created by the other articles. These Constitutional limits, he believed,

> **can be preserved in practice no other way than through the medium of the courts of justice**; whose **duty** it must be to declare all acts contrary to the manifest tenor of the constitution void. **Without this**, all the reservations of particular **rights** or privileges would **amount to nothing**. [*Id.*, p. 402 (emphasis added).]

This did not mean that the judiciary was empowered to substitute its judgment for the other branches. Rather, Hamilton stated:

> It only supposes that the **power of the people** is superior to both; and **the will** of the legislature declared in its statutes, stands in opposition to that **of the people declared in the constitution**, the judges ought to be governed by the latter, rather than the former. [*Id.*, p. 403 (emphasis added).]

As guardians of the Constitution as it is written, the court should take care to discharge its duty to the people without regard for prudential concerns, such as

fear of resistance to its authority by the other branches. Rather, it is obligated to do its duty as prescribed by its structural role.

C. Petitioners' Arguments Against Standing Disregard this Court's Intended Role.

Petitioners urge this court to bar Respondents access to the courthouse door for three basic reasons:

> 1. Respondents have not met an elevated standard for standing because of "separation-of-powers concerns" based on a congressional standing case, Raines v. Byrd, 521 U.S. 811, 819-820 (1997). Pet. Br., p. 23.
>
> 2. Respondents' injuries would not be redressed by judicial relief. Pet. Br., pp. 38-47.
>
> 3. Respondents alleged "injury in fact" is "conjectural," "speculative," and not "imminent" because plaintiffs "may not be targeted by surveillance ... and have not established that their communications have been or ever will be incidentally collected...." Pet. Br., p. 23.

First, Raines v. Byrd involved a challenge to the Line Item Veto Act by six members of Congress who believed that their legislative power was diluted by that law. Chief Justice Rehnquist opined that ""The law of Art. III standing is built on a single basic idea — the idea of separation of powers' ... [an] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere...."

Raines, at 820 (citations omitted). However, that statement should be understood in view of this case being brought by "renegade members of Congress to bring down a law they disliked but could not defeat...." N. Devins & M. Fitts, "The Triumph of Timing," GEORGETOWN L.J. 86:351 (1997-98). Whatever meaning that statement had in a dispute which involved an internecine Congressional battle, it cannot be used to deny to the judiciary the power to do what was its "proper constitutional sphere," which Federalist No. 78 explained as preserving the limits on federal power, and the "duty ... to declare all acts contrary to the manifest tenor of the constitution void."

Second, Petitioners' claim that Respondents' concerns could not be remedied by the court is thoroughly refuted by Respondents. *See* Resp. Br., pp. 48-53. Although the Second Circuit's decision was limited to reversing the district court on standing, and no injunction has yet issued, there is no reason to assume an injunction against warrantless surveillance of Americans engaged in international communications would not be effective.

Third, the government does not allege that respondents "will not" be targeted, but that they "may not" be targeted. This is no different from the government's position in Hedges v. Obama, where the government denied standing but refused to clearly respond to the U.S. District Judge Kathleen Forrest's repeated questions as to whether plaintiffs in that case could be assured their work would **not** subject them to detention under section 1021(b)(2) of the 2012 National Defense Authorization Act. The Government's

arguments found unpersuasive by Judge Forrest in that case are also persuasive here. *See* Hedges v. Obama, 2012 U.S. Dist. LEXIS 130354, *7-13 (S.D.N.Y. Sept. 12, 2012).[11] Moreover, if the communications being intercepted are properly viewed as Respondents' property (*see* Section I), it should make no difference that the government targeted the other side of the conversation, and that the seizure of Respondents' communications was incidental. Indeed, "incidental" would appear to be the wrong word, as in every case the seizure of both sides of a targeted communication is not just incidental but actually quite intended, inevitable, and unavoidable.

D. Fourth Amendment Rights Are Indispensable Freedoms which Can Only Be Protected by this Court.

Dissenting from the Court's determination that a particular search and seizure was reasonable, Justice, and former Attorney General, Robert Jackson charged that this Court had been treating Fourth Amendment rights as "secondary." Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). Based on

---

[11] There, Judge Forrest rejected the Government's invitation to defer its role to the political branches: "And this Court gives appropriate and due deference to the executive and legislative branches – and understands the limits of its own (and their) role(s). But due deference does not eliminate the judicial obligation to rule on properly presented constitutional questions. Courts must safeguard core constitutional rights.... Presented, as this Court is, with unavoidable constitutional questions, it declines to step aside." [*Id.* at *15-16.]

his experience, Justice Jackson knew, and asserted, that Fourth Amendment rights:

> belong in the catalog of **indispensable freedoms**. Among deprivations of rights, none is so effective in **cowing a population, crushing the spirit of the individual and putting terror in every heart**. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every **arbitrary** government. And one need only briefly to have **dwelt and worked** among a people possessed of many admirable qualities but deprived of these rights to know that the **human personality deteriorates** and **dignity and self-reliance disappear** where **homes, persons and possessions** are subject at any hour to unheralded **search and seizure by the police**. [*Id.* at 180-81 (emphasis added).]

No doubt, the object of Justice Jackson's 1949 specific reference to his having "dwelt and worked among a people possessed of many admirable qualities" yet living under "arbitrary government" is unmistakable. Justice Jackson had returned just three years previously from several months of service as U.S. Chief Counsel for the prosecution of Nazi war criminals. From that experience in Germany, he brought back with him a fresh understanding of the significance of the Fourth Amendment to the preservation of a free people. He had studied the loss of freedom by the German people, and wrote his Brinegar dissent to instruct on the corrosive effect of a

government which does not respect the property rights of the people.

In a book written later by Whitney Harris, Executive Trial Counsel to Justice Jackson at Nuremberg, the lessons learned were expounded further. In Germany, Harris wrote, "[t]he Weimar Constitution contained positive guarantees of basic civil rights. Chief among them were personal freedom ... inviolability of the home [and] secrecy of letters and other communications...."[12] However, Harris continued, the Weimar Constitution also contained:

> a special provision under which the Reich President was authorized to **suspend basic civil rights** "if the **public safety** and order in the German Reich are considerably disturbed or endangered...." Hitler saw in that article the **Achilles' heel** of the Weimar Republic.... **A conflagration was needed**. And it was plain that the Nazis themselves would have to set the fire....
>
> The plan finally agreed upon was the burning of the Reichstag....
>
> The morning after the fire Hitler obtained from [President] Von Hindenburg the decree of the Reich President **suspending the bill of**

---

[12] W. Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II At Nuremberg, Germany, 1945-1946, Southern Methodist University Press (1954), p. 41.

> **rights** of the Weimar Constitution, on the representation that the building had been burned by the Communists and a national emergency had resulted.... It provided in part:
>
> "[personal freedom ... inviolability of the home [and] secrecy of letters and other communications] are suspended until further notice [and] **violations** of the privacy of postal, **telegraphic, and telephonic communications**, and warrants for house-searches, orders for **confiscations as well as restrictions on property**, are also **permissible** beyond the legal limits unless otherwise prescribed."
>
> The decree made possible the seizure of political opponents without danger of judicial interference. It was utilized to destroy all effective political opposition.... The voice of the people had been stilled. Neither constitutional liberties nor power of government would be returned to them under Hitler. [Tyranny on Trial, pp. 45-47 (emphasis added).]

While Petitioners would have this court simply trust the executive branch with the FISA Amendments Act, Justice Jackson believed the Court's role could not be delegated to the Executive Branch:

> [T]he right to be secure against **searches and seizures** is **one of the most difficult to protect** since the **officers are themselves the chief invaders**, there is **no enforcement**

> **outside of court**. [Brinegar, 338 U.S. at 181 (Jackson, J., dissenting) (emphasis added).]

The protections of the Fourth Amendment are truly indispensable freedoms essential for the preservation of a free state. Should this Court now abdicate its intended role as protector of the people's Constitution, the Executive could become emboldened, and the results could be catastrophic and irreversible. Indeed, the Court should never assume that another opportunity will present itself later when it will make a stand to defend the Constitution against erosion justified by the necessity of war.

III. IT IS ILLEGITIMATE TO DENY STANDING IN ORDER TO INSULATE SENIOR GOVERNMENT OFFICIALS.

In their *amicus curiae* brief filed in support of Petitioners in this case, six former Attorneys General argue that the "federal courts should not be called upon to determine the legality of Congress's careful compromise...." *Amicus* Brief of Attorneys General ("AG Brief"), p. 8. The Attorneys General brief argues that limiting standing here will "'prevent[] courts of law from undertaking tasks assigned to the political branches....'" AG Brief p. 9, citing Lewis v. Casey, 518 U.S. 343, 349 (1996). The court system, the Attorneys General would have us believe, is the **last place** that issues like those presented in this case should be decided. Instead, they argue, the courts should trust the executive branch to regulate itself, content that there is a robust system of "significant procedural and substantive protections" — whereby government

officials monitor "**themselves**." AG Brief, pp. 19, 22 (emphasis added).

The Attorneys General make the novel argument that the "standing doctrine provides important legal protections to federal government defendants who must be able to perform their duties without the distraction of litigation...." AG Brief, p. 1. The Attorneys General argue that "changes to the nature and conduct of national security activities ... have spurred a barrage of **unnecessary and disruptive lawsuits** premised on policy disagreements...." AG Brief, p. 3 (emphasis added). The brief cites no specific objectionable cases.

Although the AG Brief acknowledges that the standing doctrine is designed to ensure "the existence of a concrete 'case or controversy'" (AG Brief, p. 1), it urges this Court to use the standing doctrine as a tool to enable government officials to avoid accountability for their actions. The Attorneys General argue that "[h]igh-ranking government officials are often sued in their personal capacity long after their service concludes" and that finding standing in this case will "divert[] the attention of government officials" (AG Brief, p. 12, 13). The standing doctrine was never designed to insulate the federal government from constitutional violations, and the Attorneys General cite no case or legal principle in support of this contention.

The Attorneys General also argue that it is not important to find standing here, because Plaintiffs and others will have opportunities to challenge FISA in (i) "criminal proceedings" or (ii) "a Freedom of

Information Act Request." AG Brief, p. 23. But those avenues are in no way comparable or sufficient. An American should not need to be charged with commission of a crime to have his day in court. An FOIA request will not force the disclosure of classified documents. And, of course, in the vast majority of situations where the violation by government leads to neither prosecution nor awareness by the victim, there is no remedy.

As Justice Jackson explained in his Brinegar dissent, there are limited judicial remedies for executive violations of the Fourth Amendment: "[o]nly occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted." Brinegar at 181. As Justice Jackson believed, "there are ... many unlawful searches ... about which courts do nothing, and about which we never hear." *Id.* This problem is exponentially magnified where, as here, government officials act in secret, its activities never being exposed to the light of day.

In Jones, concurring Justice Sotomayor warned that, because much electronic surveillance "proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices" and "'alter[s] the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.*, 132 S.Ct. at 956 (citation omitted). Justice Sotomayor questioned the "appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable

to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent 'a too permeating police surveillance'...." *Id.* (citation omitted). In a regime of surreptitious electronic surveillance when government agents simply eavesdrop on a phone call, or read an email, there is no battered-in door or ransacked file cabinet to alert the victim. As Justice Jackson concluded, "[t]he citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." *Id.* at 182.

If there somehow were a way to ensure that FISA surveillance was done perfectly, and entirely in secret, its fruit never used in criminal proceedings, no victim ever discovering that he had been the subject of secret surveillance — then there would never be a way to challenge to the FISA Amendments. It simply cannot be the answer that standing does not arise till a violation has occurred — a violation of which the victim will most likely have no knowledge.

CONCLUSION

For the reasons set out above, the judgment of the U.S. Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

GARY G. KREEP
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN

Ramona, CA 92065
(760) 788-6624
Attorney for U.S. Justice Foundation

ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae
**Counsel of Record*

September 24, 2012

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-1025

Supreme Court, U.S.
FILED
SEP 24 2012
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES R. CLAPPER, JR.,
DIRECTOR OF NATIONAL INTELLIGENCE, et al.,

Petitioners,

v.

AMNESTY INTERNATIONAL USA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

JOSHUA L. DRATEL
Co-Chair, AMICUS COMMITTEE
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
2 Wall St., Third Floor
New York, NY 10005
(212) 732-0707

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF JOHN D. CLINE
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 322-8319
cline@johndclinelaw.com
Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether respondents lack Article III standing to seek prospective relief.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Gonzalez v. United States,
553 U.S. 242 (2008) 5

Hickman v. Taylor,
329 U.S. 495 (1947) 3, 4

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 10

Massachusetts v. EPA,
549 U.S. 497 (2007) 3, 10

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) 5

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 5

Rompilla v. Beard,
545 U.S. 374 (2005) 5

Swidler & Berlin v. United States,
524 U.S. 399 (1998) 3, 4

United States v. Abu-Jihaad, 630 F.3d 102 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3062 (2011).....11

United States v. Duka, 671 F.3d 329 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2764 (2012).....11

United States v. El-Mezain,
664 F.3d 467 (5th Cir. 2011) 11

X Corp. v. Doe, 805 F. Supp. 1298 (E.D. Va. 1992), *aff'd mem.*, 17 F.3d 1435 (4th Cir. 1994) 4

STATUTES AND RULES

50 U.S.C. § 1801(h)(3) 8
50 U.S.C. § 1806(c) 11
50 U.S.C. § 1881a 2, 11
50 U.S.C. § 1881e 11
Sup. Ct. R. 37.3(a) 1
Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

American Bar Association, Model Rules of Professional Conduct, Rule 1.6 (1983) 3, 4, 5

American Bar Association, Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-3.1(a) (3d ed. 1993) 6, 7

INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Because the surveillance challenged in this action poses a direct, concrete threat to the confidentiality that is critical to an

---

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.3(a).

effective defense in criminal cases, NACDL has decided to present its views for the Court's consideration.

SUMMARY OF ARGUMENT

Confidentiality is essential to the work of criminal defense lawyers. Under the standards of professional responsibility that guide the work of defense counsel, including both the relevant rules of professional conduct and the American Bar Association Standards for Criminal Justice, counsel must preserve the confidentiality of information relating to the representation of a client.

In light of this duty of confidentiality, petitioners are wrong to contend that respondents McKay and Royce--both criminal defense lawyers--have alleged merely "speculative" and "self-inflicted" injuries from potential surveillance under the FISA Amendments Act, 50 U.S.C. § 1881a ("FAA"). That surveillance may target regions, persons, and subjects heavily implicated by the matters in which McKay and Royce serve as criminal defense counsel. As the court of appeals recognized, they have good reason to believe that their communications in particular will be intercepted in the course of surveillance under the FAA. Pet. App. 37a-38a. They thus must choose between foregoing international communications about sensitive matters or incurring the expense and burden of traveling overseas for in-person communication. The substantial, specific burdens that the FAA imposes on McKay and Royce create a personal stake in the

outcome of the controversy and guarantee the "concrete adverseness" necessary for standing. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quotation omitted). Their challenge to the constitutionality of the FAA should be permitted to proceed to decision on the merits.

ARGUMENT

1. Keeping a client's information confidential is among a lawyer's most fundamental duties. The principle of confidentiality manifests itself in the attorney-client privilege, "one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). It finds expression in the work-product doctrine, recognized by this Court sixty-five years ago in *Hickman v. Taylor*, 329 U.S. 495 (1947). And the American Bar Association Model Rules of Professional Conduct, on which lawyers' ethics codes in most states are based, Pet. App. 378a, prohibit attorneys from "reveal[ing] information relating to the representation of a client" absent the client's consent, except under narrowly circumscribed conditions. American Bar Association, Model Rules of Professional Conduct ("MRPC"), Rule 1.6(a) (1983).

Confidentiality serves crucial functions in the American legal system. In the context of litigation, this Court has found that

> it is essential that a lawyer work with a certain degree of privacy, free from

> unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

Hickman, 329 U.S. at 510-11. Similarly, the protections of the attorney-client privilege "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Swidler & Berlin*, 524 U.S. at 403 (quotation omitted).

2. Confidentiality also serves important interests outside the context of litigation. The ethical prohibition on "reveal[ing] information relating to the representation of a client" is broader than the attorney-client privilege and the attorney work-product doctrine. It establishes the duty of confidentiality in circumstances not involving lawful compulsion (such as a subpoena or a lawful discovery request). *See, e.g., X Corp. v. Doe*, 805 F. Supp. 1298, 1307-10 (E.D. Va. 1992) (explaining difference between attorney-client privilege and duty of confidentiality), *aff'd mem.*, 17 F.3d 1435 (4th Cir. 1994); MRPC 1.6, Comment 3 ("The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law."). The ethical duty of confidentiality

> contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

MRPC 1.6, Comment 2.

3. The duty of confidentiality has particular significance for criminal defense lawyers. The American Bar Association's Standards for Criminal Justice, to which this Court has looked often in determining the professional duties of criminal defense lawyers,[2] emphasize the importance of protecting the client's confidentiality. Standard 4-3.1(a) provides that "[d]efense counsel should seek to

---

[2] *See, e.g., Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010); *Gonzalez v. United States*, 553 U.S. 242, 249 (2008); *Rompilla v. Beard*, 545 U.S. 374, 386 (2005); *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

establish a relationship of trust and confidence with the accused," and it adds: "Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures." American Bar Association, Standards for Criminal Justice, Defense Function, Standard 4-3.1(a) (3d ed. 1993) ("ABA Standards"). The Commentary explains that "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution." ABA Standard 4-3.1, Commentary.

The Standards address a circumstance analogous to the surveillance at issue here. Standard 4-3.1(b) provides that "[t]o ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses and other places where accused persons must confer with counsel." ABA Standard 4-3.1(b). The Commentary declares: "It is fundamental that the communication between client and lawyer be untrammeled. The reading by prison officials of correspondence between prisoners and their lawyers inhibits communication and impairs the attorney-

client relationship, *may compel time-consuming and expensive travel by the lawyer to assure confidentiality*, or even prevent legitimate grievances from being brought to light." *Id.*, Commentary (emphasis added).

The ABA Standards confirm, in the criminal defense context, that Professor Gillers' opinion is correct; lawyers have a duty to "safeguard confidential information." Pet. App. 380a. Professor Gillers is correct as well, with respect to criminal defense lawyers, that "[i]f an attorney has reason to believe that sensitive and confidential information related to the representation of a client and transmitted by telephone, fax, or e-mail is reasonably likely to be intercepted by others, he or she may not use that means of communication in exchanging or collecting the information. He or she must find a safer mode of communication, if one is available, which may require communication in person." Pet. App. 381a. The Standards contemplate a similar course; if attorney-client mail is intercepted by government officials, defense counsel may be compelled to undertake "time-consuming and expensive travel . . . to assure confidentiality." ABA Standard 4-3.1, Commentary; *see* Pet App. 371a-372a (Declaration of Scott McKay) (given likelihood of surveillance, "[w]henever possible, I . . . collect information in person rather than by telephone or email. . . . Collecting information in person sometimes requires travel that is both time-consuming and expensive.").

4. In light of the obligations imposed under the relevant professional responsibility rules, plaintiffs McKay and Royce--both criminal defense lawyers--allege concrete, specific injuries from potential surveillance under the FAA. That surveillance may target regions, persons, and subjects heavily implicated by the matters in which McKay and Royce serve as criminal defense counsel. As the court of appeals recognized, they have good reason to believe that their communications in particular will be intercepted in the course of surveillance under the FAA. Pet. App. 37a-38a. The minimization provisions of the FAA do nothing to cure the harm. The FAA does not allow judicial supervision of the minimization process, and the statute permits the government to retain evidence of a crime "which has been . . . committed." 50 U.S.C. § 1801(h)(3). That description encompasses communications that any criminal defense lawyer is likely to have with clients, witnesses, consultants, and co-counsel.

5. To understand the injury that plaintiffs McKay and Royce suffer as a result of FAA surveillance, consider a hypothetical surveillance program closer to home. Imagine that Congress enacts a statute that permits the Executive to conduct surveillance targeting the financial services industry in Manhattan.[3] The stated purpose of the statute is to enhance the government's ability to detect and thwart ongoing or planned insider trading. The statute permits the government, with a court's

[3] The legality of such a hypothetical program is irrelevant for purposes of this example, just as the legality of the FAA is not before the Court in this case.

approval, to intercept any electronic communication to or from any person associated with any bank, brokerage, or other financial institution in Manhattan. The statute requires no individualized probable cause showing. Although the statute requires minimization, it (like the FAA) permits the government to retain evidence of crimes that have been committed. As with the FAA, the government administers the surveillance program entirely in secret.

Now suppose that a District of Columbia criminal defense attorney representing a Manhattan hedge fund manager suspected of insider trading wants to communicate with her client, or with potential witnesses at her client's hedge fund. Under the rules of professional responsibility and the ABA Standards, the attorney cannot discuss sensitive matters relating to the case by telephone or email. Given that the attorney's client resides in the target area, works in the target industry, and is suspected of involvement in the targeted conduct, she can reasonably expect that her communications are among those most likely to be intercepted--even though, of course, she cannot be certain because of the secrecy that surrounds the program.

The attorney's ethical obligation to maintain the confidentiality of information relating to the representation requires her either to forego communicating about sensitive matters or to make the trip from D.C. to New York to have the communications in person. The attorney faces, in other words, precisely the choice that the FAA

imposes on McKay and Royce--except that for them in person communication requires international travel, rather than a day trip up the eastern seaboard and back. The criminal defense attorney in this hypothetical example suffers "concrete and particularized" injury from the statute, even though it does not target her directly, and she plainly has standing to challenge its constitutionality. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). McKay and Royce even more clearly have standing to challenge the FAA.

6. The ultimate question concerning Article III standing is whether respondents--and particularly criminal defense attorneys McKay and Royce--"have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts v. EPA*, 549 U.S. at 517 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The substantial, specific burdens that the FAA imposes on McKay and Royce create precisely such a "personal stake" and guarantee the necessary "concrete adverseness." Their challenge to the constitutionality of the FAA should be permitted to proceed to decision on the merits.

7. There is no reason to believe that other opportunities to challenge the constitutionality of the FAA will arise. Petitioners suggested below that such a challenge could be made in the context of a criminal case in which the government announces its intention to use FAA-derived evidence. *See* 50

U.S.C. §§ 1806(c) (requiring notice of the government's intent to use FISA-derived evidence), 1881e(a) (FAA-derived information subject to the notice provision of § 1806(c)). But in the four years since the FAA was enacted, not a single reported case has appeared in which a criminal defendant challenged the constitutionality of the statute.[4] That may be because the government has not made use of FAA-derived information in criminal cases. It may be because the government has not disclosed, in its FISA notices under § 1806(c), that the surveillance was conducted under the authority of § 1881a rather than the pre-existing provisions of FISA, and has rejected requests for clarification.[5] Regardless of the reason, there have been no reported challenges to the FAA in criminal cases, and the theoretical possibility of review in a future case does not redress the concrete injury that respondents McKay and Royce are now suffering.

---

[4] By contrast, during this same period there have been several reported challenges to the constitutionality of FISA surveillance. *See, e.g., United States v. Duka*, 671 F.3d 329, 336-46 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2764 (2012); *United States v. El-Mezain*, 664 F.3d 467, 563-70 (5th Cir. 2011); *United States v. Abu-Jihaad*, 630 F.3d 102, 117-29 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3062 (2011).

[5] For example, in *United States v. Hafiz Khan, et al.*, No. 11-cr-20331-RNS (S.D. Fla.), the government's FISA notice did not mention § 1881a. Docket No. 17 (available on PACER). The defense moved for clarification whether the surveillance at issue relied on the FAA, Docket No. 219, and the district court granted the motion, Docket No. 278 at 5. The government sought reconsideration of the disclosure order. Docket No. 284. The district court granted the government's motion and refused to require it to inform the defense whether the surveillance was FAA-derived. Docket No. 285. The court denied a defense motion for reconsideration. Docket No. 351.

CONCLUSION

For these reasons, the Court should find that respondents have Article III standing and affirm the court of appeals' judgment.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF
JOHN D. CLINE
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 322-8319

JOSHUA L. DRATEL
CO-CHAIR, AMICUS
COMMITTEE
NAT'L ASS'N OF
CRIMINAL DEFENSE
LAWYERS
2 Wall St., Third Floor
New York, NY 10005
(212) 732-0707

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

September 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1025

IN THE

Supreme Court of the United States

JAMES R. CLAPPER, JR.,
DIRECTOR OF NATIONAL INTELLIGENCE, ET AL.,

Petitioners,

—v.—

AMNESTY INTERNATIONAL USA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK STATE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS SYLVIA ROYCE, SCOTT MCKAY, AND DAVID NEVIN

GREGORY L. DISKANT
THOMAS W. PIPPERT
BENJAMIN S. LITMAN
JOSEPH R. RICHIE
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

SEYMOUR W. JAMES, JR.
Counsel of Record
President
NEW YORK STATE
BAR ASSOCIATION
One Elk Street
Albany, New York 12207
(518) 463-3200
sjames@nysba.org

HON. STEWART F. HANCOCK, JR.
GORIS & O'SULLIVAN LLC
5 Mill Street
Cazenovia, New York 13035
(315) 815-5092

Attorneys for Amicus Curiae
New York State Bar Association

Library of Congress
Law Library

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF FACTS 3

I. An Attorney's Duty of Confidentiality... 3

A. History of the Duty 3

B. The Duty of Confidentiality Is Essential to the Rule of Law 5

C. Attorneys Are Required to Comply with the Duty of Confidentiality 7

D. Technology Has Changed How Attorneys Must Meet Their Duty of Confidentiality 8

E. Model Rule 1.6(c) Requires an Attorney to Protect from Unauthorized Access Confidential Information Relating to the Representation of a Client 13

II. The FISA Amendments Act of 2008 15

A. Broader Interception of Foreign Intelligence Information 16

B. Reduced Judicial Safeguards Against Interception of Communications ... 17

C. The Technology Available to the Government 19

PAGE

III. The Circumstances of the Attorney-Respondents 20

A. The Lawyers' Ethical Obligations 20

B. Identity of the Lawyers' Clients and Nature of the Representation 21

C. Location of the Lawyers' Clients, Potential Witnesses, and Other Sources of Information Relating to the Lawyers' Representation of Their Clients 23

D. The Lawyers' Communications Relate to Foreign Intelligence Information 24

E. Methods of the Lawyers' Communications with Persons Located Outside of the United States 26

SUMMARY OF ARGUMENT 26

ARGUMENT 27

I. The Attorney-Respondents Do Not Have a Reasonable Expectation of Privacy in Their International Electronic Communications Relating to the Representation of Their Clients 27

PAGE

II. The Attorney-Respondents Are Required to Take Reasonable Precautions to Protect the Confidentiality of Their International Electronic Communications Relating to the Representation of Their Clients 30

CONCLUSION 32

TABLE OF AUTHORITIES

Cases PAGE

Amnesty Int'l USA v. Clapper,
638 F.3d 118 (2d Cir. 2011) 16, 18

Amnesty Int'l USA v. Clapper,
667 F.3d 163 (2d Cir. 2011) 16, 18

Chirac v. Reinicker,
24 U.S. (11 Wheat.) 280 (1826) 5

Connick v. Thompson,
131 S. Ct. 1350 (2011) 7, 32

Hickman v. Taylor,
329 U.S. 495 (1947) 6

Hunt v. Blackburn,
128 U.S. 464 (1888) 6

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,
130 S. Ct. 1605 (2010) 8, 32

Nix v. Whiteside, 475 U.S. 157 (1986)..... 8, 32

Thiery v. Bye,
228 Wis. 2d 231 (Ct. App. 1999) 7

Upjohn Co. v. United States,
449 U.S. 383 (1981) 6

Statutes

FISA Amendments Act of 2008,
Pub. L. No. 110-261, 122 Stat. 2436....*passim*

PAGE

Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et. seq.* 15

Other Authorities

American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 11-459, Duty to Protect the Confidentiality of E-mail Communications with One's Client (2011) 10, 11, 28

American Bar Association, Model Rule of Professional Conduct 1.6 ..... *passim*

District of Columbia Bar Rule XI 21

District of Columbia Rule of Professional Conduct 1.6 20

Idaho Bar Commission Rule 505 ..... 20, 21

Idaho Bar Commission Rule 506 ..... 20, 21

Idaho Rule of Professional Conduct 1.6 20

L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 Emory L.J. 909 (1980) 3

New York State Bar Association Committee on Professional Ethics, Opinion 709 (1998) 8, 9, 13, 30

New York State Bar Association Committee on Professional Ethics, Opinion 820 (2008) 9, 29

PAGE

Roger N. Walter, *An Overview of the Model Rules of Professional Conduct*, Washburn L.J. 443, 444 (1985) 4

INTEREST OF *AMICUS CURIAE*[1]

The New York State Bar Association ("NYSBA") respectfully submits this brief in support of the claim of attorney-respondents Sylvia Royce, Scott McKay, and David Nevin that they have standing to pursue this lawsuit under Article III of the U.S. Constitution. This case implicates issues of critical importance to the NYSBA: an attorney's obligation to abide by rules of ethics such as the New York Rules of Professional Conduct and the impact of technology on an attorney's ethical obligation to keep client information confidential. The government argues that the costs the attorneys in this case incur in meeting their ethical obligations are "self-inflicted" and "self-imposed." This Court should not regard an attorney's decision to comply with ethical rules as a matter of choice. Instead, the Court should affirm that lawyers are obligated to comply with rules of professional conduct.

The NYSBA is the largest and oldest voluntary state bar organization in the nation. For more than 135 years, the NYSBA has shaped the development of the law, educated and informed the profession and the public, and responded to the demands of a changing society. The NYSBA today has a membership of over 77,000 lawyers, includ-

---

[1] This *amicus* brief is filed with the consent of the parties and letters confirming that consent are being filed herewith in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief.

ing members in all fifty states and in over 100 countries around the world.

Among the principal objectives of the NYSBA is one that has remained unchanged since the Association's founding in 1877: to "elevate the standards of integrity, honor, professional skill and courtesy." In furtherance of this objective, the NYSBA proposes ethical rules to the New York state courts. New York's Rules of Professional Conduct govern all attorneys in the state and are based upon the NYSBA's proposals. As in all but one state, New York's Rules of Professional Conduct are based on the American Bar Association's Model Rules of Professional Conduct ("Model Rules").[2] Though the New York rules differ in some important respects from the Model Rules, an attorney's duty of confidentiality—the ethical obligation that is the focus of this brief—is the same under both and is common to lawyers in all American jurisdictions. *See* Pet. App. 379a (Gillers Decl. ¶ 5).

The FISA Amendments Act of 2008 (the "FAA") has expanded the government's authority to intercept communications to an unprecedented degree. As a result, the attorney-respondents have a well-founded belief that the government will intercept their international telephone calls and e-mails containing confidential client information. Their duty of confidentiality and applicable rules of pro-

[2] The Declaration of Professor Stephen Gillers, which is dated December 2008, states that every state but New York, California, and Maine "have rules that derive substantially from the Model Rules." Pet. App. 378a (Gillers Decl. ¶ 4). In 2009, both New York and Maine adopted ethical rules based on the ABA Model Rules.

fessional conduct therefore require the attorney-respondents to take affirmative steps to prevent the government from acquiring their clients' confidential information. These affirmative steps, including international travel, constitute actual and imminent injuries, and the attorney-respondents therefore satisfy the injury-in-fact and causation requirements for standing under Article III of the U.S. Constitution.

STATEMENT OF FACTS

I. An Attorney's Duty of Confidentiality

A. History of the Duty

An attorney's duty of confidentiality is perhaps the most well-known and celebrated ethical obligation of lawyers. It appears in American legal-ethics codes dating to at least the mid-nineteenth century. New York adopted the Field Code in 1849, which required an attorney to "maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his clients." L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 Emory L.J. 909, 941-42 & n.128 (1980). In 1887, Alabama adopted the nation's first formal code of ethics, which stated that "[c]ommunications and confidence between client and attorney are the property and secrets of the client, and can not be divulged, except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy." *Id.* at 941.

In 1908, the American Bar Association ("ABA") adopted the Canons of Professional Ethics to set

national standards for legal ethics. Roger N. Walter, *An Overview of the Model Rules of Professional Conduct*, 24 Washburn L.J. 443, 444 (1985). By 1920, all but 13 states had adopted some version of the Canons. *Id.* As enacted in 1908, Canon 6 required an attorney "not to divulge [a client's] secrets or confidences." In 1928, the ABA added Canon 37, which stated that

> [t]he duty to preserve his client's confidences outlasts the lawyer's employment, and extends as well to his employees . . . . A lawyer should not continue employment when he discovers that this obligation prevents the performance of his duty to his former or to his new client.

In 1969, the ABA adopted the Model Code of Professional Responsibility to replace the Canons of Professional Ethics. Walter, *supra*, at 445. A majority of the states adopted some version of the Model Code the following year. *Id.* Canon 4 of the Model Code stated that "A Lawyer Should Preserve the Confidences and Secrets of a Client."

"Confidences" are not limited to communications between an attorney and her client. Ethical Consideration 4-2 of the Model Code explained that the duty of confidentiality extends far beyond the attorney-client privilege, "exist[ing] without regard to the nature or source of information or the fact that others share the knowledge." In 1983, the ABA promulgated the Model Rules of Professional Conduct. Forty-nine states (including New York) and the District of Columbia today base their professional-conduct rules on the Model Rules. The Model Rules make clear that a lawyer's

duty of confidentiality extends to "all information relating to the representation" of a client. Model Rule 1.6(a) states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Comment 3 explains that the duty "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

B. The Duty of Confidentiality Is Essential to the Rule of Law

The duty of confidentiality promotes the administration of justice in an adversarial legal system. Lawyers and their clients have repeatedly gone to court to protect confidences learned by counsel—whether directly from clients or from other sources in the course of representation. Although the government might call the expense of such litigation "self-inflicted," litigants in these cases properly viewed protecting confidences as a matter of obligation, not of choice. And this Court has repeatedly upheld an attorney's assertion of her duty of confidentiality and explained the societal value of recognizing that duty. For instance, in discussing the attorney-client privilege in 1826, this Court stated that the rule "that confidential communications between client and attorney, are not to be revealed at any time" is "indispensable for the purposes of private justice." *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826). In 1888, this Court explained the necessity of confidentiality to the administration of justice:

> The rule which places the seal of secrecy upon communications between client and

> attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470 (1888). One hundred years later, this Court quoted the ABA's Model Code to explain the interplay of the duty of confidentiality and the effective functioning of our legal system:

> "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system . . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (quoting ABA Model Code of Prof'l Responsibility, EC 4-1).

This Court's concern for protecting information relating to the representation of a client is not limited to the positive impact on clients. The Court has also explained the positive impact on our society and the system of justice. In his concurring opinion in *Hickman v. Taylor*, 329 U.S. 495 (1947), Justice Jackson wrote about the risk of a narrow view of protecting an attorney's work product:

> The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

Hickman, 329 U.S. at 514-15 (Jackson, J., concurring).

C. Attorneys Are Required to Comply with the Duty of Confidentiality

An attorney has an ethical obligation to abide by the duty of confidentiality, but more than that, it is part of the law governing lawyers. Lawyers are governed not only by aspirational ethical guidelines, but by rules of professional conduct. Though the ABA's Model Rules are themselves not binding, the rules as adopted by state bars and courts are. Every attorney swears an oath to uphold these rules. An attorney who negligently reveals confidential client information may be liable to the client. *See Thiery v. Bye*, 228 Wis. 2d 231 (Ct. App. 1999). And as this Court has recognized, "[a]n attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment." *Connick v. Thompson*, 131 S. Ct. 1350, 1362-63

(2011); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1622 (2010) ("Model rules of professional conduct adopted by many States impose outer bounds on an attorney's pursuit of a client's interests." (citing ABA Model Rules of Professional Conduct 3.1, 4.1)); *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) (stating that Disciplinary Rule 7-102 of the ABA's Model Code of Professional Responsibility "has been adopted by Iowa, and is binding on all lawyers who appear in its courts").

D. Technology Has Changed How Attorneys Must Meet Their Duty of Confidentiality

Technological developments have transformed lawyering, and, as a result, lawyers have had to transform how they meet their ethical responsibilities. The changes over the last twenty years have been staggering. Communication by mail, fax, or landline has been supplemented by e-mail, cordless telephone, cell phones, Skype, Facebook, Twitter, and an ever-growing list of alternatives. Bar associations that promulgate ethical rules, such as the ABA and the NYSBA, have been at the forefront in recognizing how changes in technology affect the affirmative steps attorneys must take to satisfy their ethical obligations to their clients.

The NYSBA has warned attorneys that their duty of confidentiality requires them to assess the risk that their electronic communications will be intercepted and to take appropriate precautions. In 1998, the NYSBA Committee on Professional Ethics issued a formal opinion that concluded that "the criminalization of unauthorized interception

of e-mail" and "developing experience from the increasingly widespread use of Internet e-mail" made it generally permissible to communicate confidential client information by e-mail. NYSBA Comm. on Prof'l Ethics, Op. 709 (1998). However, the NYSBA Ethics Committee warned that "in circumstances in which a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception . . . the lawyer must select a more secure means of communication than unencrypted Internet e-mail." *Id.* Further, "[a] lawyer who uses Internet e-mail must also stay abreast of this evolving technology to assess any changes in the likelihood of interception." *Id.*; *see also* NYSBA Comm. on Prof'l Ethics, Op. 820 (2008) (attorney would breach obligation to preserve client confidentiality "if the service provider reserved the right to disclose [the attorney's] e-mails or the substance of the communications to third parties without the sender's permission").

The ABA has taken a similar approach. In 1997, the ABA created the Ethics 2000 Commission to reevaluate the Model Rules. The Commission was created in part due to "new issues and questions raised by the influence that technological developments are having on the delivery of legal services." Charlotte Stretch, *Overview of Ethics 2000 Commission and Report* (2002). One such issue was unauthorized access to client information. On the basis of the Commission's report, in February 2002 the ABA adopted new comments to Model Rule 1.6, clarifying that an attorney's obligation not to "reveal" confidential information includes a duty to protect confidential information from

unauthorized access or inadvertent disclosure. An attorney must "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Model Rule 1.6, cmt. 16 (2002 ed.) (a revised version of this comment is now comment 18 to Model Rule 1.6).

This duty to act competently to safeguard information relating to the representation of a client is especially acute when a lawyer electronically transmits confidential information. The 2002 amendments to the Rule 1.6 comments further provided that

> [w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients . . . . Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.

Model Rule 1.6, cmt. 17 (2002 ed.) (this is now comment 19 to Model Rule 1.6).

In 2011, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 11-459, which considered a lawyer's duty to protect confidential information

from unauthorized access. The Committee considered a hypothetical scenario in which a lawyer represents an employee in connection with a potential claim against her employer; the employee-client sends confidential e-mail to her attorney from her employer-issued computer; and the employer has a stated policy that allows it to access all employees' computers and e-mail files, including those relating to employees' personal matters. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459, Duty to Protect the Confidentiality of E-mail Communications with One's Client (Aug. 4, 2011) at 1-2.

Citing the above 2002 comments to Model Rule 1.6, the Committee concluded broadly that

> [w]henever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

Id. at 4. Because of the risk, in the Committee's hypothetical, that the employer would at some time in the future review the employee-client's communications with her lawyer, the lawyer

> should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving

> matters such as scheduling can have substantive ramifications.

Id. at 3. "This ethical obligation arises when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications . . . where there is a significant risk that the communications will be read by the employer or another third party." *Id.* The risk was viewed as significant even though, in the hypothetical, there was no reason to believe that the employer was in fact reviewing the employee's e-mails. The possibility that review might occur at some point in the future was sufficient to impose a duty to avoid that means of communication.

Rapid technological advancements after 2002 made it necessary for the ABA recently to undertake another global review of the Model Rules. This was because "[t]echnology and globalization have transformed the practice of law in ways the profession could not anticipate in 2002." ABA Comm'n on Ethics 20/20, *Introduction and Overview* (2012). As part of its continuing interest in the impact of technology on ethical obligations, the ABA formed the Commission on Ethics 20/20 "to tackle the ethical and regulatory challenges and opportunities arising from these 21st century realities." *Id.* As the Commission concluded in its report to the ABA's House of Delegates,

> [t]echnology can increase the quality of legal services, reduce the cost of legal services to existing clients, and enable lawyers to represent clients who might not otherwise have been able to afford those services. Lawyers, however, need to

> understand that technology can pose certain risks to clients' confidential information and that reasonable safeguards are ethically required.

ABA Comm'n on Ethics 20/20, *Report to Resolution 105A Revised*, § VII (2012). The risks to clients' confidential information prompted amendments in 2012 to Model Rule 1.6 and the accompanying comments.

E. Model Rule 1.6(c) Requires an Attorney to Protect from Unauthorized Access Confidential Information Relating to the Representation of a Client

As a result of the Commission on Ethics 20/20's report, on August 6, 2012 the ABA House of Delegates added a new paragraph to Model Rule 1.6. Model Rule 1.6(c) now requires that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Although the text is new, the obligation is not. As the Commission reported,

> [t]his duty is already described in several existing Comments, but the Commission concluded that, in light of the pervasive use of technology to store and transmit confidential client information, this existing obligation should be stated explicitly in the black letter of Model Rule 1.6.

ABA Comm'n on Ethics 20/20, *Report to Resolution 105A Revised*, Introduction (2012); *see also* NYSBA Comm. on Prof'l Ethics, Op. 709

(1998) (duty of confidentiality requires attorney to assess risk of interception of e-mail).

The comments to Model Rule 1.6 explain that there is a two-step process to consider in navigating this duty: whether it is reasonable to expect that a communication is private and, if not, whether the precautions taken to preserve privacy are reasonable. "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." Model Rule 1.6, cmt. 19. A lawyer meets this obligation if she uses a method of communication in which there is a "reasonable expectation of privacy." *Id.* In determining whether there is a reasonable expectation of privacy, a lawyer is to consider "the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement." *Id.* Importantly, it is the risk of unauthorized access that is key to a lawyer's ethical obligation, not whether unauthorized access actually occurs.

If a lawyer does not have a reasonable expectation of privacy in a mode of communication, she must take "special precautions." *Id.* Factors in determining whether a lawyer has made "reasonable efforts" to prevent unauthorized access to confidential information include (1) the sensitivity of the information, (2) the likelihood of disclosure if additional safeguards are not employed, (3) the cost of employing additional safeguards, (4) the difficulty of implementing the safeguards, and (5) the extent to which the safeguards adversely

affect the lawyer's ability to represent clients. Model Rule 1.6, cmt. 18.

In this case, the FAA is the starting point of the analysis. An understanding of the statute is necessary to understanding whether the attorney-respondents have a reasonable expectation of privacy in their electronic communications on behalf of their clients. The reasonableness of actions taken to preserve privacy requires consideration not only of the FAA, but also of the identity of the attorney-respondents' clients, the nature of the representation, and the type of information exchanged in the communications between the attorneys and persons located outside the United States.

II. The FISA Amendments Act of 2008

The FAA significantly broadens the government's surveillance powers in ways that can affect a lawyer's duty to protect confidential client information. The FAA allows for broader interception of communications than ever before—including expanding the number and kind of persons whose communications are subject to interception. It significantly reduces the judicial safeguards against improper interception that existed under the Foreign Intelligence Surveillance Act ("FISA") before it was amended. Meanwhile, new technology has greatly increased the government's capacity to store and search the contents of electronic communications.

A. Broader Interception of Foreign Intelligence Information

The Second Circuit explained that "[t]he FAA was passed specifically to permit surveillance that was not permitted by FISA." Pet. App. 37a (*Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 138 (2d Cir. 2011) (citing 154 Cong. Rec. S227, 227-28 (daily ed. Jan. 24, 2008) (statement of Sen. Rockefeller); *id.* at 235 (statement of Sen. Hutchison))). "[P]roponents of the statute argued that it was necessary precisely because it made possible expanded surveillance that would not have been permitted under prior law." Pet. App. 121a (*Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 167 (2d Cir. 2011) (Lynch, J., concurring) (citing 154 Cong. Rec. H5756 (daily ed. June 20, 2008) (statement of Rep. Smith); 154 Cong. Rec. S6178-79 (daily ed. June 26, 2008) (statement of Sen. Graham))).

Both before and after the FAA, FISA authorizes interception of communications concerning "foreign intelligence information." The phrase "foreign intelligence information" is defined broadly to include, among other things, all information concerning "international terrorism," "the national defense or security of the United States," and "the conduct of the foreign affairs of the United States." 50 U.S.C. § 1801(e). But the FAA expands by an exponential order of magnitude the persons whose communications about foreign intelligence information can be intercepted. Before the FAA, such a communication could be intercepted only if one of the parties to the communication was a "foreign power" or an agent thereof. 50 U.S.C. §§ 1804(a)(3)(A), 1805(a)(2)(A). But under the

FAA, any such communication can be intercepted so long as one of the parties to it is located outside of the United States and is not a U.S. citizen. 50 U.S.C. § 1881a(a).

Thus, under the original version of FISA, an attorney's reasonable expectation of privacy when communicating with non-citizens outside of the United States about foreign intelligence information turned on whether the person was an agent of a foreign power. That was a factor that the attorney could understand and account for in assessing the confidentiality of the communication. Now, a communication about foreign intelligence information with any third party can be subject to interception if the third party is a non-citizen located in a country other than the United States.

B. Reduced Judicial Safeguards Against Interception of Communications

The FAA reduces the role of the FISA Court in overseeing surveillance and eliminates many of FISA's safeguards that protected against the possibility of government overreach.[3] Two such differences are particularly relevant to the attorney-respondents' ethical obligations.

First, the FAA eliminates the requirement that the government show probable cause for surveilling a particular target or facility. In fact, the government does not even have to reveal to the FISA Court the identity of the particular per-

[3] The government has alluded to secret procedures that limit the authority it seems to have under the plain language of the FAA. Whatever those procedures might be, they have no bearing on the attorney-respondents' ethical obligations, which are determined in regard to known, not unknown, facts.

sons or facilities it wants to surveil. Pet. App. 11a–12a (*Amnesty Int'l*, 638 F.3d at 124). Rather, as the Second Circuit noted, as the plaintiffs allege, and as the government does not dispute, under the FAA "an acquisition order could seek, for example, '[a]ll telephone and e-mail communications to and from countries of foreign policy interest—for example, Russia, Venezuela, or Israel—including communications made to and from U.S. citizens and residents.'" Pet. App. 12a (*Amnesty Int'l*, 638 F.3d at 125-26).

Second, under the FAA, the FISA Court no longer monitors the government's compliance with minimization procedures. *See* Pet. App. 12a (*Amnesty Int'l*, 638 F.3d at 126 ("[U]nder the FAA, the judiciary may not monitor compliance on an ongoing basis; the FIS[A Court] may review the minimization procedures only prospectively, when the government seeks its initial surveillance authorization.")).

A particularized warrant requirement and ongoing judicial oversight of government surveillance for conversations occurring inside the United States have long stood as critical protections against government overreaching—and have served to assure that counsel have a reasonable expectation of privacy with respect to most communications occurring in this country. By authorizing what Second Circuit Judges Raggi and Lynch described as "dragnet surveillance," largely free of judicial supervision, of communications outside the United States, Pet. App. 130a (*Amnesty Int'l*, 667 F.3d at 171 (Lynch, J., concurring)); Pet. App. 161a (*Amnesty Int'l*, 667 F.3d at 187 (Raggi, J., dissenting)), the FAA substantially changes the analysis about whether the attorney-

respondents have a reasonable expectation of privacy when communicating on behalf of their clients with non-citizens outside of this country.

C. The Technology Available to the Government

The extent to which advances in technology have increased the government's ability to store and sort a large number of intercepted communications is not the subject of this brief. An exhaustive discussion can instead be found in the brief also submitted in support of respondents by fellow *amicus curiae* Electronic Privacy Information Center. A few facts, as recently reported by the *New York Times*, suffice to make the point here. Whereas "[n]ot so long ago" "the cost of data storage was too high and the capacity too low to keep everything," "[i]t will soon be technically feasible and affordable to record and store everything that can be recorded about what everyone in a country says or does." Scott Shane, *Data Storage Could Expand Reach of Surveillance*, N.Y. Times, Aug. 14, 2012 (citing the opinion of John Villasenor, an electrical engineer at the University of California, Los Angeles and a senior fellow at the Brookings Institution). According to Mr. Villasenor, "to store the audio from telephone calls made by an average person in the course of a year would require about 3.3 gigabytes and cost just 17 cents to store, a price that is expected to fall to 2 cents by 2015." *Id.* Just as acquisition and storage capacity has increased exponentially, so, too, has the ability to sort acquired and stored information. *Id.* ("And a government sleuth would, of course, be able to efficiently find anything of interest in the data because of the parallel revolution in search tech-

nology. It is hard to exaggerate how dramatic the change has been.").

The ability to store vast quantities of information and to search through this information with great efficiency, when coupled with broad government power to intercept communications, makes it reasonable to be concerned that *any* communication with a non-citizen in a country of interest to the United States might be intercepted and stored, subject to review by the government on an as-needed basis at a later time. This is not so different from the concern, addressed above, that an employee's e-mails on her employer's computers might be reviewed by the employer at a later time. That risk directly affects any reasonable expectation of privacy in the communication.

III. The Circumstances of the Attorney-Respondents

A. The Lawyers' Ethical Obligations

Attorney-respondent Sylvia Royce practices law in Washington, D.C. Pet. App. 349a (Royce Decl. ¶ 1). Attorney-respondents Scott McKay and David Nevin practice in Idaho. Pet. App. 369a (McKay Decl. ¶¶ 1-2). Like New York, both jurisdictions have professional conduct rules that are substantially the same as the ABA's Model Rules. Pet. App. 378a (Gillers Decl. ¶ 4). Although the rules governing attorney conduct in Idaho and Washington, D.C. vary in some ways from the Model Rules and from each other, the duties at issue in this case "are common to lawyers in all American jurisdictions." Pet. App. 379a (Gillers Decl. ¶ 5); *see also* D.C. Rule of Prof'l Conduct 1.6; Idaho Rule of Prof'l Conduct 1.6.

Mr. McKay and Mr. Nevin are subject to the Idaho Bar Commission Rules, which, much like the New York rules, are promulgated by the Commissioners of the Idaho State Bar and adopted by the Idaho Supreme Court. These rules state that violations of "Idaho Rules of Professional Conduct, as amended, or any other ethical canon or requirement adopted by the Supreme Court" may lead to sanctions, including disbarment. Idaho Bar Comm'n Rules 505(a), 506. Ms. Royce is subject to District of Columbia Bar Rule XI, which states as follows:

> The license to practice law in the District of Columbia is a continuing proclamation by this Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and an officer of the Court. It is the duty of every recipient of that privilege at all times and in all conduct, both professional and personal, to conform to the standards imposed upon members of the Bar as conditions for the privilege to practice law.

D.C. Bar Rule XI § 2(a). Violations of an attorney's oath of office or the rules of professional of conduct can likewise lead to sanctions by the District of Columbia Bar, including disbarment. *Id.* §§ 2(b), 3(a).

B. Identity of the Lawyers' Clients and Nature of the Representation

Ms. Royce, Mr. McKay, and Mr. Nevin all represent individuals with actual or alleged ties to

notorious anti-U.S. terrorist organizations.[4] Ms. Royce represents Mohammedou Ould Salahi, who the United States alleges has "acted as a liaison between al Qaeda members close to Osama bin Laden and a group of Islamic radicals living in Hamburg, Germany, some of whom planned or participated in the September 11 attacks." Pet. App. 349a–350a (Royce Decl. ¶¶ 3-4). Ms. Royce represents Mr. Salahi in a *habeas corpus* proceeding and in connection with several lawsuits filed under the Freedom of Information Act and Detainee Treatment Act. Pet. App. 349a (Royce Decl. ¶ 3). The United States is Mr. Salahi's adversary in each of these lawsuits. Mr. Salahi has been declared an enemy combatant by the United States and has been held at Guantanamo Bay since 2002. *Id.* (Royce Decl. ¶ 3). In the course of her representation, Ms. Royce learned that "[d]uring [Mr. Salahi's] interrogation, the government interrogators told Mr. Salahi that his family members would be arrested and mistreated if he did not cooperate." *Id.* at 350a–351a (Royce Decl. ¶ 5). This allegation has been confirmed by the Department of Justice. Office of the Inspector General, Dep't of Justice, *A Review of the FBI's Involvement in and Observation of Detainee*

---

[4] For the facts set forth in this section, we rely on the September 12, 2008 Declaration of Sylvia Royce (Pet. App. 348a–353a) and the December 15, 2008 Declaration of Scott McKay (Pet. App. 368a–375a), which was submitted on behalf of both Mr. McKay and his partner Mr. Nevin. We understand that, although each lawyer's clients and circumstances might have changed in the four years since, the statements in Ms. Royce's and Mr. McKay's 2008 declarations have not been disputed in any manner by the government and must be assumed to be true at this stage in the litigation.

Interrogations in Guantánamo Bay, Afghanistan, and Iraq, at 122-28 (2008).

Mr. McKay and Mr. Nevin represent Sami Omar Al-Hussayen, who was acquitted of criminal charges in a federal court in June 2004 and is currently a defendant in several civil cases arising out of the September 11, 2001 terrorist attacks. Pet. App. 369a–370a (McKay Decl. ¶ 3). In the course of that representation, Mr. McKay learned that "the U.S. government had intercepted some 10,000 telephone calls and 20,000 email communications involving Mr. Al-Hussayen." *Id.* at 370a (McKay Decl. ¶ 6).

Mr. McKay and Mr. Nevin also represent Khalid Sheik Mohammed, whom the United States has charged with "international terrorism and an alleged criminal conspiracy involving the events of September 11, 2001, al Qaeda, various charged and uncharged co-conspirators, and acts taking place in a number of countries." *Id.* at 369a, 373a (McKay Decl. ¶¶ 3, 12). Mr. Mohammed, who confessed to having been the mastermind of the September 11, 2001 attacks on the United States, was captured in Pakistan in 2003 and has been held at Guantanamo Bay since September 2006. *Id.* at 374a (McKay Decl. ¶ 18).

C. Location of the Lawyers' Clients, Potential Witnesses, and Other Sources of Information Relating to the Lawyers' Representation of Their Clients

Both Mr. Salahi and Mr. Mohammed are currently being held at Guantanamo Bay, Cuba. Mr. Al-Hussayen is in Saudi Arabia.

In connection with her representation of Mr. Salahi, Ms. Royce regularly communicates with persons located outside of the United States: Mr. Salahi's brother, Yahdih Ould, who lives in Germany; co-counsel Brahim Ould Ebety, who lives in Mauritania (Mr. Salahi's country of origin), and Emmanuel Altit, who lives in France; foreign journalists working for print media such as *Der Spiegel* (a German publication) and the Toronto *Globe and Mail* (a Canadian publication); and employees of human-rights organizations in offices outside of the United States. Pet. App. 350a–353a (Royce Decl. ¶¶ 5, 6, 8).

In connection with their representation of Mr. Mohammed, Mr. McKay and Mr. Nevin regularly communicate with "experts, investigators, attorneys, family members of Mr. Mohammed and others who are located abroad," including "journalists, government officials, political figures, and other third parties." Pet. App. 371a–374a (McKay Dec. ¶¶ 7, 9, 12).

Finally, in connection with their representation of Mr. Al-Hussayen, Mr. McKay and Mr. Nevin regularly engage in communications with Mr. Al-Hussayen himself and "witnesses, experts, and others based abroad." *Id.* at 370a, 373a (McKay Decl. ¶¶ 5, 11).

D. The Lawyers' Communications Relate to Foreign Intelligence Information

To be able to competently represent their clients, Ms. Royce's, Mr. McKay's, and Mr. Nevin's international communications necessarily involve matters that fit within FISA's definition of "foreign intelligence information." Ms. Royce's inter-

national communications with Mr. Salahi's brother, human-rights organizations, and members of the media "relate to international terrorism and the foreign affairs of the United States." Pet. App. 350a, 352a–353a (Royce Decl. ¶¶ 5, 8). Her international communications with human-rights organizations and media members "include discussions of the policies of the U.S. government relating to the detention and interrogation of enemy combatants, the connections or lack thereof between my client and others held at Guantanamo, and the propriety or impropriety of government decisions with respect to classification of national security information." *Id.* at 353a (Royce Decl. ¶ 8). And her international communications with her Mauritanian and French co-counsel involve "legal strategy and the U.S. government's policies with respect to the detention of prisoners at Guantanamo Bay." *Id.* at 351a (Royce Decl. ¶ 6).

Mr. McKay's and Mr. Nevin's international communications in connection with their representation of Mr. Al-Hussayen and Mr. Mohammed "concern litigation strategy and other matters relevant to the litigation[s]" involving those individuals. Pet. App. 370a–371a (McKay Decl. ¶¶ 5, 7). "All of these communications are sensitive, and some of them are privileged." *Id.* Because the litigations involving Mr. Al-Hussayen and Mr. Mohammed relate to the September 11 terrorist attacks, communications relating to those litigations necessarily meet FISA's definition of "foreign intelligence information."

E. Methods of the Lawyers' Communications with Persons Located Outside of the United States

Prior to passage of the FAA, Ms. Royce's, Mr. McKay's, and Mr. Nevin's regular international communications in connection with their representation of their clients were conducted by telephone or e-mail. Pet. App. 351a–352a (Royce Decl. ¶ 7); Pet. App. 370a–371a (McKay Decl. ¶¶ 5, 7). These forms of communication are now subject to interception by the government, for immediate or subsequent review. The attorney-respondents contend that, as a result of the FAA, there is no longer a reasonable expectation of privacy in communication by such methods and they are therefore required by their ethical obligations to resort to other, more expensive, means of communication on behalf of their clients. Based on the facts in this record, which are undisputed by the government and which the NYSBA accepts for purposes of this brief, the NYSBA agrees with these conclusions by the attorney-respondents.

SUMMARY OF ARGUMENT

Because of the FAA's expansion of the government's surveillance power, Ms. Royce, Mr. McKay, and Mr. Nevin do not have a reasonable expectation of privacy in their international electronic communications in connection with the representation of their clients. The rules of professional conduct governing these lawyers therefore compel them to take appropriate precautions to protect against government access to those communications. The precautions that they have taken in

their factual circumstances, including international travel, are both reasonable and required.

ARGUMENT

I. The Attorney-Respondents Do Not Have a Reasonable Expectation of Privacy in Their International Electronic Communications Relating to the Representation of Their Clients

"Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement." Model Rule 1.6, cmt. 18. As discussed above, Ms. Royce's, Mr. McKay's, and Mr. Nevin's communications relating to their representation of accused terrorists include sensitive information with non-citizens outside of the United States. And far from protecting those communications, the FAA permits them to be intercepted.

In the course of representing their clients, the attorney-respondents interact with witnesses and sources (*e.g.*, family members of clients, potential witnesses, human-rights organizations, and journalists) that are located outside of the United States. As far as the record reflects, none of these individuals are "foreign powers" or agents thereof, and so their communications would not have been subject to interception under FISA. Because of the FAA's vast increase in the breadth of permitted surveillance, the attorney-respondents' international electronic communications with non-citizens

unaffiliated with any foreign power now fall squarely within the government's surveillance power.

The FAA's reduction of judicial safeguards on the government's deployment of its surveillance power further increases the risk that the attorneys' international communications will be monitored. As legal-ethics expert Professor Gillers stated, "the risk of interception is exponentially expanded over what it would be if the government were obligated to demonstrate probable cause and identify its individual targets, to the satisfaction of a neutral judicial officer, as a prelude to interception." *See* Pet. App. 386a (Gillers Decl. ¶ 21).

It is irrelevant that the lawyers cannot show with certainty that the government will in fact intercept any of their international communications. As Professor Gillers opined, "their ethical obligations do not depend on any such proof. It is triggered by the *risk* that the communications will be intercepted. Or to put it another way, the duty is to *safeguard* confidential information." Pet. App. 384a (Gillers Decl. ¶ 17) (emphasis in original); *see also* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 at 3 ("[T]his ethical obligation arises when the lawyer knows or reasonably should know . . . there is a significant risk that the communications will be read by the employer or another third party.").

Ms. Royce, Mr. McKay, and Mr. Nevin have good reason to believe that their international communications will in fact be intercepted. As Professor Gillers stated, "the lawyers have good reason for this belief because of the status of their clients, the identity and location of witnesses and sources,

and the broad authority that the FAA grants the government." Pet. App. 387a (Gillers Decl. ¶ 23). The government did actually intercept thousands of communications involving Mr. Al-Hussayen even before the FAA expanded the government's surveillance authority. Mr. McKay "learned during the course of defending Mr. Al-Hussayen against federal criminal charges in Idaho that the U.S. government had intercepted some 10,000 telephone calls and 20,000 email communications involving Mr. Al-Hussayen." Pet. App. 370a (McKay Decl. ¶ 6). And the government has told Mr. Salahi, Ms. Royce's client, that it intended to target his family members. Pet. App. 350a–351a (Royce Decl. ¶ 5).

Just as an attorney does not have a reasonable expectation of privacy using an employer's e-mail system to communicate with an employee-client when the employer has reserved the right to monitor the e-mail, ABA Standing Comm. on Ethics and Prof'l Resp., Formal Op. 11-459 at 3, Ms. Royce, Mr. McKay, and Mr. Nevin do not have a reasonable expectation of privacy using e-mail and telephone systems whose providers are under a legal obligation to allow the government to monitor those communications. In both situations, the risk of unauthorized access is especially serious because the party with the power to intercept confidential communications is the client's adversary. And in both situations, the risk of unauthorized access is especially high because of a written policy -- in the case of the FAA, a law -- authorizing interception. *Cf.* NYSBA Comm. on Prof'l Ethics, Op. 820 (2008) (attorney would breach duty of confidentiality "if the service provider reserved the

right to disclose [the attorney's] e-mails or the substance of the communications to third parties without the sender's permission"). Even though there is no certainty that the communications will in fact be intercepted, the risk is unacceptably high and the attorney has no reasonable expectation of privacy. *Id.*; *see also* NYSBA Comm. on Prof'l Ethics, Op. 709 (1998) ("[I]n circumstances in which a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception . . . the lawyer must select a more secure means of transmission than unencrypted Internet e-mail.").

II. The Attorney-Respondents Are Required to Take Reasonable Precautions to Protect the Confidentiality of Their International Electronic Communications Relating to the Representation of Their Clients

Because the attorney-respondents have no reasonable expectation of privacy in their international electronic communications relating to the representation of their clients, their ethical obligations require that they "take reasonable precautions to prevent the information from coming into the hands of unintended recipients." ABA Model Rule 1.6, cmt. 19. At a minimum, the lawyer must avoid using that method of communication and choose another method that does afford the lawyer a reasonable expectation of privacy. *See id.*

Based on the undisputed factual record, as a result of the risk of interception posed by the FAA, Ms. Royce, Mr. McKay, and Mr. Nevin have taken and will continue to take multiple precautions to

protect the confidentiality of their international communications relating to the representation of their clients. *See* Pet. App. 375a (McKay Decl. ¶ 14) ("Because of the FAA, we now have to assume that every one of our international communications may be monitored by the government."); Pet. App. 351a–352a (Royce Decl. ¶ 7) ("The risk that the government will monitor my communications with co-counsel . . . compel[s] [us] to limit the information we share by telephone and e-mail.").

Specifically, Ms. Royce has, at various times, "exchange[d] generalities rather than specifics," "decide[d] that [my co-counsel and I] cannot exchange the relevant information at all," and "travel[ed] to share information, views and ideas" "[w]here information is both especially important and especially sensitive." *Id.* Likewise, Mr. McKay and Mr. Nevin have, at various times, "[c]ollect[ed] information in person," which "sometimes requires travel that is both time-consuming and expensive," "minimize[d] the amount of sensitive information that [they] communicate by telephone or email," and "forgo[ne] the information altogether" when "travel is impractical or prohibitively expensive." *Id.* at 371a–372a (McKay Decl. ¶¶ 8, 10).

The government argues that the time and money spent by the attorney-respondents to protect the confidentiality of their international communications are "self-imposed" or "self-inflicted" harms. *See* Pet'r's Br. 18, 21–23, 38–43. That is false. This Court should not accept the government's invitation to belittle counsel for complying with their ethical rules. As members of the bar,

they did not have any choice in the matter. Attorneys must comply with their ethical obligations. "An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment." *Connick v. Thompson*, 131 S. Ct. 1350, 1362-63 (2011); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1622 (2010) ("Model rules of professional conduct adopted by many States impose outer bounds on an attorney's pursuit of a client's interests." (citing ABA Model Rules of Professional Conduct 3.1, 4.1)); *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) (stating that Disciplinary Rule 7-102 of the ABA's Model Code of Professional Responsibility "has been adopted by Iowa, and is binding on all lawyers who appear in its courts.").

As Professor Gillers stated, "[t]he lawyers' decision to avoid electronic means of communications is not discretionary. It is obligatory. This limitation on the attorneys' work severely restricts their ability to represent their client effectively." Pet. App. 387a (Gillers Decl. ¶ 23).

CONCLUSION

The declarations of Ms. Royce and Mr. McKay set forth a straightforward and correct analysis of the problem they face. With the passage of the FAA, they no longer have a reasonable expectation of privacy in their communications with non-citizens outside of the United States in connection with client matters. Consistent with the canons of ethics, the attorney-respondents have incurred and will continue to incur time and expense using

alternative means of communication. This is not "self-inflicted" or "self-imposed" harm. Rather, these efforts are the minimum that the attorney-respondents are obligated to undertake in order to protect the confidentiality of their clients' information. This Court has repeatedly recognized the importance of that confidentiality. As *amicus curiae*, the New York State Bar Association respectfully requests that the Court recognize that the costs the attorney-respondents have incurred and will continue to incur are not "self-imposed," but are dictated by the attorneys' ethical obligations and the exponentially increased risk of interception posed by the FAA, causing the attorney-respondents to suffer actual and imminent harm.

Dated: September 24, 2012

Respectfully submitted,

SEYMOUR W. JAMES, JR.
Counsel of Record
President
NEW YORK STATE BAR ASSOCIATION
One Elk Street
Albany, New York 12207
(518) 463-3200

Of Counsel:

GREGORY L. DISKANT
THOMAS W. PIPPERT
BENJAMIN S. LITMAN
JOSEPH R. RICHIE
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

HON. STEWART F. HANCOCK, JR.
GORIS & O'SULLIVAN LLC
5 Mill Street
Cazenovia, New York 13035
(315) 815-5092

Attorneys for Amicus Curiae
New York State Bar Association

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1025

IN THE

Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, *ET AL.*,
Petitioners,

v.

AMNESTY INTERNATIONAL USA, *ET AL.*,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF RESPONDENTS

Bruce D. Brown
Counsel of Record
Gregg P. Leslie
Kristen Rasmussen
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Ste 1100
Arlington, VA 22209-2100
bbrown@rcfp.org
(703) 807-2100

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT. 3

Unmonitored communications between journalists and their sources are vital to ensuring the free flow of information to the public 3

CONCLUSION 10

TABLE OF AUTHORITIES

Case

N.Y. Times Co. v. United States
403 U.S. 713 (1971) 9

Statute and Executive Order

Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–06, 119 Stat. 2680 (2005) 7

Exec. Order No. 13,491
74 Fed. Reg. 4893 (Jan. 22, 2009) 7

Other Authorities

Aff. of the late Jack Nelson, *in* Ex. 17 to Mem. of Points and Authorities in Opp'n to the Government's Mot. *in Limine* and in Supp. of the Mot. of James Risen to Quash Subpoena and/or for Protective Order, *United States v. Sterling* Case No. 1:10cr485 (E.D. Va. June 21, 2011) 6

Aff. of James Risen, *in* Mem. of Points and Authorities in Opp'n to the Government's Mot. *in Limine* and in Supp. of the Mot. of James Risen to Quash Subpoena and/or for Protective Order, *United States v. Sterling*, Case No. 1:10cr485 (E.D. Va. June 21, 2011) 4–5

Decl. of Scott Armstrong, *in* Ex. 14 to Mem. of Points and Authorities in Opp'n to the Government's Mot. *in Limine* and in Supp. of the Mot. of James Risen to Quash Subpoena and/or for Protective Order, *United States v. Sterling*, Case No. 1:10cr485 (E.D. Va. June 21, 2011) 4

Decl. of Carl Bernstein, *in* Ex. 15 to Mem. of Points and Authorities in Opp'n to the Government's Mot. *in Limine* and in Supp. of the Mot. of James Risen to Quash Subpoena and/or for Protective Order, *United States v. Sterling*, Case No. 1:10cr485 (E.D. Va. June 21, 2011) 6

Decl. of Dana Priest, *in* Ex. 18 to Mem. of Points and Authorities in Opp'n to the Government's Mot. *in Limine* and in Supp. of the Mot. of James Risen to Quash Subpoena and/or for Protective Order, *United States v. Sterling*, Case No. 1:10cr485 (E.D. Va. June 21, 2011) 3–4

Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information* Wash. Post, Feb. 15, 1989, at A25 ..... 9 n.6

Seymour Hersh, *Torture at Abu Ghraib* The New Yorker, May 10, 2004, at 42 ..... 8 n.2

Miles Moffeit, *Brutal Interrogation in Iraq* Denver Post, May 19, 2004, at A1 ..... 8 n.3

Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77* Post *Articles*, Wash. Post Oct. 23, 1984, at A12 ..... 9 n.5

Walter Pincus, *Carter Is Weighing Radiation Warhead*, Wash. Post, June 7, 1977, at A5.... 8 n.4

Walter Pincus, *Pentagon Wanted Secrecy on Neutron Bomb Production*, Wash. Post June 25, 1977, at A1 ..... 8 n.4

Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, at A1 7

Todd Richissin, *Soldiers' Warnings Ignored* Balt. Sun, May 9, 2004, at A1 ..... 8 n.3

James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times Dec. 16, 2005, at A1 7

Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations* N.Y. Times, Oct. 4, 2007, at A1 7

STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press ("the Reporters Committee" or "*amicus*") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

As advocates for the rights of the news media and others who gather and disseminate information to the public, *amicus* has a strong interest in ensuring that journalists' ability to credibly promise confidentiality to sources remains uninhibited. Without the use of these invaluable reporting tools, the news media's performance of their constitutionally protected duty to report on matters of significant public interest and concern is severely burdened. Thus, *amicus* respectfully requests that this Court affirm the decision below.

---

[1] Pursuant to Sup. Ct. R. 37, counsel for *amicus curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amicus curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The government's broad powers under the FISA Amendments Act of 2008 ("the FAA" or "the Act"), which allows federal officials to monitor international electronic communications even if one party is in the United States, directly affect the ability of journalists to gather and report news stories and constitute a harm sufficient to create standing to challenge the Act. Oftentimes, a source's willingness to provide a journalist with truthful information about significant matters of public interest and concern is wholly dependent on an assurance that the source's identity will not be revealed, thereby exposing him or her to retaliation. The amendments at issue, however, hamper the formation of these important journalist-source relationships by eliminating journalists' ability to make good-faith promises of confidentiality to international sources.

And perhaps nowhere is the interest in ensuring the free flow of information from the news media to the public stronger than in the context of national security, where pervasive secrecy often prevents public accountability of government activity. In fact, it is only through journalists' reliance on confidential sources that many reports of government misconduct that otherwise would have remained shielded from public scrutiny have been revealed. As such, journalists — and by extension the public — are harmed by the government intrusion into their communications with international sources authorized by the Act. Thus, *amicus* respectfully requests that this Court affirm the decision below.

ARGUMENT

Unmonitored communications between journalists and their sources are vital to ensuring the free flow of information to the public.

The strong interest in ensuring journalists' ability to credibly promise confidentiality to sources is not one of mere convenience or privacy concerns. The ability to foster and maintain confidential relationships with sources is crucial to effective reporting. And when the story involves international sources, electronic communications become the only means of contact and so government monitoring under the FAA burdens journalists' ability to gather information in the very area where the need for freedom from government interference is arguably the strongest.

This nation's historical practice of respecting the confidentiality of journalists' communications with their sources has been vital to ensuring that the news media effectively perform their constitutionally protected role of disseminating information to the public, including information about the otherwise-secret conduct of our government in the name of protecting the national security. As Pulitzer Prize-winning investigative reporter Dana Priest, who has authored "hundreds of news articles on matters of national security" for *The Washington Post*, stated, because "the U.S. government has made secret nearly every aspect of its counterterrorism program, it would have been impossible to report even on the basic contours of [the government's] decisions, operations and programs without the help of confidential sources." Decl. of Da-

na Priest, *in* Ex. 18 to Mem. of Points and Authorities in Opp'n to the Government's Mot. *in Limine* and in Supp. of the Mot. of James Risen to Quash Subpoena and/or for Protective Order, *United States v. Sterling*, Case No. 1:10cr485, at ¶¶ 4, 5 (E.D. Va. June 21, 2011); *see also id.* at Ex. 14, ¶ 14 (decl. of Scott Armstrong) (explaining that in the context of national security policies and practices, most accurate information often is available only from confidential sources).

Similarly, *New York Times* intelligence and national security reporter James Risen has said his "major revelations of great public interest" — from the CIA's use of waterboarding in interrogations of terrorism suspects, to the government's pre-invasion knowledge that Iraq had abandoned its programs to develop weapons of mass destruction, to the Bush administration's use of records of banking transactions involving thousands of Americans to help detect financiers of terrorism — would likely have been impossible without the use of confidential sources. *Id.* ¶ 15, 51 (aff. of James Risen). And Risen's ability to rely on such sources to reveal this information is particularly critical in the context of national security, an interest the government regularly cites to "cover[] up its own wrongdoing or avoid[] embarrassment" and thereby evade public oversight. *Id.* ¶ 18. In explaining his refusal to comply with a subpoena for testimony in the trial of an ex-CIA official accused of disclosing classified information about a CIA operation to disrupt Iran's nuclear program, the two-time Pulitzer Prize winner described the "immediate[] and substantial[] harm" that occurs when journalists' con-

fidential communications with their sources are threatened:

> In my ongoing reporting and newsgathering, numerous sources of confidential information have told me that they are comfortable speaking to me in confidence specifically because I have shown that I will honor my word and maintain their confidence even in the face of Government efforts to force me to reveal their identities or information. The fact that I have not previously revealed my sources has allowed me to gain access to newsworthy information that I could not otherwise get.

Id. ¶ 64.

Perhaps more significantly, Risen testified that government interference with his confidential relationships would "imped[e] all other reporters' ability to gather and report the news in the future." *Id.* ¶ 52. Compelling journalists to reveal information they obtained during conversations with confidential sources would "seriously compromise journalists' integrity and independence, qualities that are essential to our ability to gain the trust of potential news sources and to effectively investigate and report on newsworthy events." *Id.* ¶ 53.

Former *Washington Post* investigative reporter Carl Bernstein, who, along with then-fellow *Post* reporter Bob Woodward, relied on information from a confidential source to bring down a presidency, has

testified that Mark Felt "would not have agreed to be a source for our Watergate reporting had Mr. Woodward and I not been able to assure him total and absolute confidentiality." *Id.* at Ex. 15, ¶¶ 3–5 (decl. of Carl Bernstein). Anonymous sources were the basis for the information developed and contained in nearly all of the more than 150 articles Woodward and Bernstein authored in the ten months following the break-in at the Democratic National Committee's offices in Washington, D.C., Bernstein said, adding that no major sources of information were identified by name in any of those articles. *Id.* "Almost all of the articles I co-authored with Mr. Woodward on Watergate could not have been reported or published without the assistance of our confidential sources and without the ability to grant them anonymity, including the individual known as Deep Throat." *Id.*; *see also id.* at Ex. 17, ¶ 6 (aff. of the late Jack Nelson) (stating that without confidential sources, the *Los Angeles Times* would have been unable to report "numerous . . . stories involving corruption or governmental abuses in at least six [presidential] administrations").

Some of the most distinguished and honored news reporting in our history has necessarily relied on information from confidential sources, including in the following instances:

- Relying on confidential sources, *The New York Times* revealed that the National Security Agency — under a then-illegal secret wiretapping program that was the precursor to the FAA — had been monitoring phone calls and e-mail messages into and out of the United States involving suspected al-Qaida operatives

without seeking approval from federal courts. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

- Relying in part on information from confidential sources, *The New York Times* and other news organizations reported on the use of harsh interrogation tactics against terrorism suspects in U.S. custody. *See, e.g.*, Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1. Such news coverage precipitated a wide-ranging public debate that prompted Congress to prohibit certain interrogation tactics entirely and led to the promulgation of an executive order repudiating many of them. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–06, 119 Stat. 2680 (2005); Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

- *The Washington Post* relied on confidential sources inside and outside the federal government to report on the CIA's network of secret prisons, known as "black sites," for terrorism suspects. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, at A1.

- CBS News and *New Yorker* contributor Seymour Hersh reported accounts of abuse of detainees at Abu Ghraib prison in Iraq. Relying on graphic photographs in the possession of U.S. Army officials and a classified report that

was "not meant for public release," CBS and Hersh documented the abusive conditions inside the Iraqi prison.[2] After these incidents became public, other military sources who had witnessed abuse came forward but often only "on the condition that they not be identified because of concern that their military careers would be ruined."[3]

- Journalist Walter Pincus of *The Washington Post* relied on confidential sources in reporting that President Carter planned to move forward with the development of a so-called "neutron bomb," a weapon that could inflict massive causalities through radiation without extensive destruction of property.[4] While the information disclosed to Pincus by his sources likely was classified, the public outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon,

---

[2] Seymour M. Hersh, *Torture at Abu Ghraib*, The New Yorker, May 10, 2004, at 42, 43.

[3] *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, Balt. Sun, May 9, 2004, at A1 (interviewing anonymous soldiers who witnessed abuse at Abu Ghraib); *see also* Miles Moffeit, *Brutal Interrogation in Iraq*, Denver Post, May 19, 2004, at A1 (relying on confidential "Pentagon documents" and an interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

[4] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, Wash. Post, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy on Neutron Bomb Production*, Wash. Post, June 25, 1977, at A1.

and no administration since has tried to revive it.[5]

- The Pentagon's secret history of America's involvement in Vietnam, which famously became known as the "Pentagon Papers," was provided to the news media by a confidential source. *See N.Y. Times Co. v. United States*, 403 U.S. 713 (1971). In refusing to enjoin publication of the information, several justices suggested that the newspapers' sources may well have broken the law by turning over the materials. *Id.* at 754 (Harlan, J., dissenting). Nonetheless, "[i]n revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do," *id.* at 717 (Black, J., concurring), and there is now a broad consensus that no legitimate reason existed for concealing the Pentagon Papers from the public in the first place.[6]

---

[5] *See* Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, Wash. Post, Oct. 23, 1984, at A12 (quoting former Secretary of Defense Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

[6] Former U.S. Solicitor General Erwin N. Griswold, who argued the government's case in this Court, wrote nearly twenty years later that the publication posed no "trace of a threat" to national security. Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court affirm the decision below.

Respectfully submitted,

Bruce D. Brown
Counsel of Record
Gregg P. Leslie
Kristen Rasmussen
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Ste 1100
Arlington, VA 22209-2100
bbrown@rcfp.org
(703) 807-2100

September 24, 2012